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Rescuing Rule 3(c) From the 800-Pound Gorilla: The Case for a No-Nonsense Approach to Defective Notices of Appeal

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RESCUING RULE 3(c) FROM THE 800-POUND GORILLA: THE CASE FOR A NO-NONSENSE APPROACH TO DEFECTIVE NOTICES OF APPEAL

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> *[The court's] "reasoning" is known in forums less august than this United States Court of Appeals as an "800-pound gorilla rule." That is to say, even though this court has no authority whatever to excuse compliance with Rule 3(c)(1)(C), it nevertheless has the "power" to do so because more active judges on this court are willing to excuse noncompliance with the rule than are unwilling to do so.*[1]

Introduction

The content requirements of a notice of appeal, as set forth in Rule 3(c) of the Federal Rules of Appellate Procedure, could not be more straightforward. The enforcement of those requirements by the federal courts of appeals, however, has become quite convoluted. The purpose of this Article is to offer an approach to the enforcement of Rule 3(c) that is as clear-cut as its requirements.

Rule 3(c)[2] prescribes that a notice of appeal "specify the party or parties taking the appeal";[3] "designate the judgment, order, or part thereof being

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1. Dillon v. United States, 184 F.3d 556, 559 (6th Cir. 1999) (en banc) (Ryan, J., dissenting).

2. Following a restyling of Rule 3 of the Federal Rules of Appellate Procedure in 1998, Rule 3(c) was converted from a single paragraph of text into five numbered paragraphs, with the first of these paragraphs containing the respective content requirements of a notice of appeal in the lettered subparagraphs (A), (B), and (C). *See* FED. R. APP. P. 3 advisory committee's note (1998 Amendments); 20 JAMES WILLIAM MOORE ET AL., MOORE'S FEDERAL PRACTICE § 303App.07[1] (3d ed. 2005); 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3949.4 (3d ed. 1999). The actual focus of this Article, therefore, is Rule 3(c)(1). The pertinent provision will nevertheless be referred to simply as "Rule 3(c)" in order to maintain consistency with references to that provision in cases and other literature authored prior to the restyling.

3. FED. R. APP. P. 3(c)(1)(A).

appealed";[4] and "name the court to which the appeal is taken."[5] When confronted with a notice that fails to comply with one or more of these requirements, the federal courts of appeals have resorted to a variety of differing responses. Some courts, viewing the dictates of Rule 3(c) as jurisdictional in nature, have simply dismissed the appeal in question for want of jurisdiction. Rejecting this jurisdictional conception, other courts have reached the merits of the appeal, despite the violation of Rule 3(c), as long as the violation did not prejudice or mislead the appellee. Alternatively, in order to avoid the difficult choice between dismissing the appeal and excusing the violation, some courts have distorted the relevant requirement of Rule 3(c) in order to conclude that there was no violation after all.

In fairness to the courts of appeals, their disordered enforcement of Rule 3(c) stems from faulty direction on the part the Supreme Court of the United States. In *Foman v. Davis*,[6] the Court characterized noncompliance with the content requirements of a notice of appeal as "mere technicalities" that can be readily forgiven when the pertinent defect does not mislead or prejudice the appellee.[7] The Court radically shifted course in the subsequent case of *Torres v. Oakland Scavenger Co.*,[8] where it held that Rule 3(c) is a jurisdictional prerequisite and emphasized that noncompliance with its requirements was fatal to an appeal.[9] However, rather than repudiating *Foman* as incompatible with its new approach, the *Torres* Court simply distinguished *Foman* on a dubious basis.[10] To further complicate matters, the Court has favorably cited incompatible aspects of *Foman* on several occasions since *Torres*.[11]

This Article contends that the confusion and unpredictability that has plagued the enforcement of Rule 3(c) in the courts of appeals can be easily remedied through the Supreme Court's prescription of a no-nonsense approach to defective notices of appeal. First and foremost, this approach would demand that a court of appeals treat a litigant's violation of a requirement of Rule 3(c) as such, rather than resorting to crafty interpretations of the requirement at issue in an effort to cleanse the notice of the defect. Second, once satisfied that a violation exists, the court must dismiss the appeal for lack of jurisdiction pursuant to the jurisdictional conception of Rule 3(c) espoused in *Torres*. To

4. *Id.* 3(c)(1)(B).
5. *Id.* 3(c)(1)(C).
6. 371 U.S. 178 (1962).
7. *Id.* at 181.
8. 487 U.S. 312 (1988).
9. *Id.* at 317.
10. *Id.* at 316-17.
11. *See* Becker v. Montgomery, 532 U.S. 757, 767-68 (2001); FirsTier Mortgage Co. v. Investors Mortgage Ins. Co., 498 U.S. 269, 276 n.6 (1991).

the extent that *Foman* would authorize the court to reach the merits of the appeal notwithstanding the defect, it is irreconcilable with *Torres* and must be expressly overruled.

The proposed approach would have the unfortunate effect of depriving many litigants of the opportunity to prosecute an appeal, including those litigants who would have prevailed on appeal were it not for a dismissal based upon a violation of Rule 3(c). But while the courts of appeals will lack the authority to determine where justice lies in those individual appeals, a no-nonsense enforcement of Rule 3(c) would lead to a significantly greater degree of justice in the totality of appeals by securing a fair and orderly process. Moreover, the mechanism of rule amendment can always be utilized to ease compliance with those requirements, or to abolish one or more of them altogether. For these reasons, a court of appeals may, in good conscience, resist the temptation to sustain an appeal either by forgiving a Rule 3(c) violation because it did not mislead or prejudice the appellee, or by dodging that inquiry through the creation of an "800-pound gorilla rule," as one circuit judge characterized his court's determination that a notice of appeal containing the name of no court of appeals whatsoever had somehow managed to "name the court to which the appeal [was] taken" within the meaning of Rule 3(c).[12]

Part I of this Article provides background on the provisions and doctrines governing both the timing and content of a notice of appeal. Part II explores the Supreme Court's muddled jurisprudence on the content requirements contained in Rule 3(c), with an emphasis on the *Torres* Court's jurisdictional conception of those requirements and the incompatibility of that conception with the underpinnings of its prior decision in *Foman*. Part III, which assesses the post-*Torres* application of Rule 3(c)'s requirements among the courts of appeals, demonstrates how each of those requirements has been subject to conflicting enforcement approaches, even within the same court. Lastly, Part IV of the Article examines how a no-nonsense enforcement of those requirements would assuage the confusion and unpredictability that conflicting enforcement has wrought.

I. The Timing and Content Requirements of a Notice of Appeal

In the federal judicial system, the course of action that a litigant must employ to initiate an appeal from a decision of a district court depends upon the nature of the decision to be challenged.[13] With respect to a decision that a litigant may

12. *See supra* note 1 and accompanying text. *See generally* FED. R. APP. P. 3(c)(1)(C) (containing the quoted language).

13. In addition to decisions of district courts, a significant component of the federal appellate docket concerns decisions of federal administrative agencies. A litigant initiates a

appeal only with the permission of the appropriate court of appeals,[14] the prescribed method is to file with that court a petition for permission to appeal.[15] The focus of this Article, however, is on the requisite procedure for commencing an appeal from a decision that is appealable as a matter of right,[16] namely, the timely filing of a notice of appeal with the district court that rendered the decision.[17]

On the surface, a notice of appeal appears to be a document of little to no significance, considering that it is typically a single page in length and conveys only a minimal amount of information.[18] As many disappointed litigants have discovered over the years, however, the various requirements of timing and content that pertain to a notice of appeal carry jurisdictional repercussions. Accordingly, the failure to comply with those requirements often results in the loss of an opportunity to appeal.

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challenge to the decision of a federal administrative agency not by filing a notice of appeal, but by filing "a petition for review with the clerk of a court of appeals authorized to review the agency order." FED. R. APP. P. 15(a)(1).

14. *See, e.g.*, 28 U.S.C. § 1292(b) (2000) ("When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, *in its discretion*, permit an appeal to be taken from such order . . . ." (emphasis added)); FED. R. CIV. P. 23(f) ("A court of appeals may *in its discretion* permit an appeal from an order of a district court granting or denying class action certification . . . ." (emphasis added)).

15. FED. R. APP. P. 5(a)(1) ("To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal.").

16. *See* 28 U.S.C. § 1291 (2000) (granting appellate jurisdiction over "appeals from all final decisions of the district courts of the United States"); *id.* § 1292(a)(1) (granting appellate jurisdiction over "appeals from . . . [i]nterlocutory orders of the district courts of the United States . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions"); *id.* § 1292(a)(2) (granting appellate jurisdiction over "appeals from . . . [i]nterlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property"); *id.* § 1292(a)(3) (granting appellate jurisdiction over "appeals from . . . [i]nterlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed").

17. *See* FED. R. APP. P. 3(a)(1) ("An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk . . . .").

18. *See id.* app., form 1 (Notice of Appeal to a Court of Appeals from a Judgment or Order of a District Court); *id.* 3(c)(5) ("Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.").

A. The Timing Requirements of Rule 4

The starting point for a discussion of the timing and content requirements of a notice of appeal is Rule 3 of the Federal Rules of Appellate Procedure, which provides that "[a]n appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk *within the time allowed by Rule 4*."[19] The time limit imposed by Rule 4 for any given appeal depends primarily upon the nature of the underlying action. In a civil proceeding, a litigant generally has thirty days from the district court's entry of a judgment or order in which to file a notice of appeal.[20] This thirty-day limit converts to a sixty-day limit, however, if the federal government (or an officer or agency thereof) is a party to the litigation.[21] In a criminal proceeding, on the other hand, the time limit depends further upon the status of the prospective appellant: a defendant has only ten days to file a notice of appeal,[22] while the government has thirty days.[23]

The Supreme Court has long recognized that the preceding timing requirements of a notice of appeal are jurisdictional in nature. The Court squarely addressed the issue for the first time in *United States v. Robinson*.[24] *Robinson* concerned two defendants who sought to challenge a judgment of conviction in the Court of Appeals for the D.C. Circuit.[25] Their notices of appeal, however, were filed in excess of the ten-day limit set forth in then-Rule 37(a)(2) of the Federal Rules of Criminal Procedure.[26] Based upon the

19. *Id.* 3(a)(1) (emphasis added).

20. *Id.* 4(a)(1)(A) ("In a civil case, . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered."). This thirty-day requirement reflects 28 U.S.C. § 2107, which provides in relevant part that "no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree." 28 U.S.C. § 2107(a) (2000).

21. FED. R. APP. P. 4(a)(1)(B) ("When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered."). This sixty-day limit also reflects § 2107. *See* 28 U.S.C. § 2107(b) ("In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.").

22. FED. R. APP. P. 4(b)(1)(A) ("In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of: (i) the entry of either the judgment or the order being appealed; or (ii) the filing of the government's notice of appeal.").

23. *Id.* 4(b)(1)(B) ("When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of: (i) the entry of the judgment or order being appealed; or (ii) the filing of a notice of appeal by any defendant.").

24. 361 U.S. 220 (1960).

25. *See id.* at 220-21.

26. *See id.* at 221. *See generally* FED. R. CRIM. P. 37(a)(2), 18 U.S.C. app. (1958) (repealed

district court's finding that the defendants' failure to file their notices in time resulted from excusable neglect, the D.C. Circuit held that the notices were sufficient to confer jurisdiction over the appeals.[27]

In reversing the D.C. Circuit's decision, the Supreme Court confirmed the conclusion, which most courts of appeals had reached by that point, that "the filing of a notice of appeal within the 10-day period prescribed by Rule 37(a)(2) is mandatory and jurisdictional."[28] The Court relied primarily upon then-Rule 45(b) of the Federal Rules of Criminal Procedure, which stated in pertinent part that "the court may not enlarge the period . . . for taking an appeal."[29] Describing this language as "quite plain and clear," the Court was satisfied that "to recognize a late notice of appeal is actually to 'enlarge' the period for taking an appeal" within the meaning of then-Rule 45(b).[30] Although noting that "powerful policy arguments may be made both for and against greater flexibility with respect to the time for the taking of an appeal," the Court opined that such a matter "must be resolved through the rule-making process and not by judicial decision."[31]

1968) (providing the rule in effect at the time of the case: "An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from . . . ."). Rule 37(a)(2) is the predecessor to Rule 4(b) of the Federal Rules of Appellate Procedure. *See infra* note 31 and accompanying text.

27. *Robinson*, 361 U.S. at 221-22.

28. *Id.* at 224.

29. FED. R. CRIM. P. 45(b), 18 U.S.C. app. (1958) (repealed 1968).

30. *Robinson*, 361 U.S. at 224.

31. *Id.* at 229. In the wake of *Robinson*, Rule 37(a)(2) was amended to authorize a district court to extend the time to file a notice of appeal "[u]pon a showing of excusable neglect." FED. R. CRIM. P. 37(a)(2), 18 U.S.C. app. (Supp. II 1967) (repealed 1968). At the same time, Rule 37(a)(2)'s counterpart in the Federal Rules of Civil Procedure was amended to authorize such extensions in civil cases. *See* FED. R. CIV. P. 73(b), 28 U.S.C. app. (Supp. II 1967) (repealed 1968). Rule 4 of the Federal Rules of Appellate Procedure currently permits extensions in both civil and criminal cases for either excusable neglect or good cause. *See* FED. R. APP. P. 4(a)(5)(A)(ii), 4(b)(4).

A civil litigant who cannot make the showing necessary to obtain an extension under Rule 4(a)(5)(A) can instead bring a motion to reopen the time to file a notice of appeal, which the district court may grant if all of the following conditions are met:

> (A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;
>
> (B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and
>
> (C) the court finds that no party would be prejudiced.

Id. 4(a)(6). This device reflects the substance of section 2107(c). *See* 28 U.S.C. § 2107(c) (2000) ("[I]f the district court finds—(1) that a party entitled to notice of the entry of a judgment

Several years after *Robinson*, Rule 4 of the Federal Rules of Appellate Procedure absorbed the timing requirements prescribed by Rule 37(a)(2), along with the timing requirements prescribed by its counterpart in the Federal Rules of Civil Procedure.[32] The Supreme Court has since extended to civil proceedings its determination in *Robinson* that the timing requirements in criminal proceedings are "mandatory and jurisdictional."[33] Accordingly, the jurisdictional nature of Rule 4's timing requirements in both the civil and criminal contexts is now firmly established.

B. The Content Requirements of Rule 3(c)

While prescribing the timing requirements of a notice of appeal, Rule 4 provides no direction regarding the information that a notice of appeal must convey. The subject of content is instead addressed by Rule 3(c) of the Federal Rules of Appellate Procedure,[34] which states that a notice of appeal must "specify the party or parties taking the appeal";[35] "designate the judgment, order,

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or order did not receive such notice from the clerk or any party within 21 days of its entry, and (2) that no party would be prejudiced, the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.").

32. FED. R. APP. P. 4(a) advisory committee's note (1967 Adoption) ("This subdivision is derived from FRCP 73(a) without any change of substance."); *id.* 4(b) advisory committee's note (1967 Adoption) ("This subdivision is derived from FRCrP 37(a)(2) without change of substance.").

33. *See* Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 61 (1982); Browder v. Dir., Dep't of Corr., 434 U.S. 257, 264 (1978). Interestingly, the *Browder* Court did not rely upon the language of § 2107(a) in recognizing the jurisdictional nature of the timing requirements of a notice of appeal in a civil proceeding. *See generally* 28 U.S.C. § 2107(a) (2000) ("Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree."). Instead, the Court based its determination on the *Robinson* Court's recognition of then-Rule 37(a)(2) as a jurisdictional prerequisite. *See Browder*, 434 U.S. at 264.

34. When adopted, Rule 3(c) absorbed the content requirements of a notice of appeal previously set forth in Rule 73(b) of the Federal Rules of Civil Procedure and Rule 37(a)(1) of the Federal Rules of Criminal Procedure. *See* FED. R. APP. P. 3(c) advisory committee's note (1967 Adoption) ("This subdivision is identical with corresponding provisions in FRCP 73(b) and FRCrP 37(a)(1).").

35. *Id.* 3(c)(1)(A). In its entirety, this subdivision provides the following:

> (1) The notice of appeal must:
>
> (A) specify the party or parties taking the appeal *by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X."*

Id. (emphasis added). The emphasized language was added in response to the Supreme Court's

or part thereof being appealed";[36] and "name the court to which the appeal is taken."[37] Notwithstanding the straightforward nature of these requirements,[38] it is not uncommon for a litigant to file a notice of appeal that fails to satisfy one or more of them. A court of appeals confronted with such a document must then determine if the defect results in a loss of jurisdiction over the appeal.

Unfortunately for the courts of appeals, the question whether the content requirements of Rule 3(c) have the same jurisdictional significance as the timing requirements of Rule 4 has proven to be a thorny one for the Supreme Court. The following section details the Court's struggle with that question.

II. Rule 3(c) as a Jurisdictional Prerequisite

A. The Appellant-Friendly Approach of Foman v. Davis

The Supreme Court offered its first noteworthy statement regarding the nature of the content requirements of a notice of appeal in *Foman v. Davis*.[39] *Foman* arose from a suit by Lenore Foman against the executrix of her deceased father's estate.[40] After the district court dismissed Foman's complaint, she brought

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decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). *See infra* notes 147-59 and accompanying text.

Because Rule 3(c)(1)(A) requires specification only of the "party or parties *taking* the appeal," FED. R. APP. P. 3(c)(1)(A) (emphasis added), the courts of appeals have by and large rejected the contention that an appeal is subject to dismissal because the notice of appeal wrongfully omitted the name of an *appellee*. *See, e.g.*, Weiss v. Cooley, 230 F.3d 1027, 1031 (7th Cir. 2000); MIF Realty v. Rochester Assocs., 92 F.3d 752, 757-58 (8th Cir. 1996); Crawford v. Roane, 53 F.3d 750, 752 (6th Cir. 1995); Lackey v. Atl. Richfield Co., 990 F.2d 202, 206 (5th Cir. 1993); Mock v. T.G. & Y. Stores Co., 971 F.2d 522, 531 n.9 (10th Cir. 1992); Hale v. Arizona, 967 F.2d 1356, 1361 (9th Cir. 1992); D.C. Nurses' Ass'n v. District of Columbia, 854 F.2d 1448, 1450 (D.C. Cir. 1988) (per curiam); *see also* 16A WRIGHT, MILLER & COOPER, *supra* note 2, § 3949.4 ("Nor need the name of the prospective appellees be set forth in the body of the notice."). *Contra* Crawford v. Medina Gen. Hosp., 96 F.3d 830, 833 (6th Cir. 1996) ("Crawford filed a timely notice of appeal as to defendants Medina, Kermendy, and Milligan only, thus abandoning her claims against defendant Slee."); Davis v. Fulton County, 90 F.3d 1346, 1354 (8th Cir. 1996) (stating that "[i]ntended appellees must be provided with notice that the appeal is being taken . . . and the failure to list all in the notice of appeal could suggest abandonment of the claims against them"); 20 MOORE ET AL., *supra* note 2, § 303.20[2][b] ("If the notice of appeal specifically names some potential multiple appellees and fails to name others, jurisdiction over the omitted parties may be denied if they reasonably relied on the fact that they were not named and prejudice would result from their later inclusion.").

36. FED. R. APP. P. 3(c)(1)(B).

37. *Id.* 3(c)(1)(C).

38. *See* 20 MOORE ET AL., *supra* note 2, § 303.20[1] (describing Rule 3(c)'s requirements as "obviously quite simple").

39. 371 U.S. 178 (1962).

40. *Id.* at 179.

motions to vacate the judgment dismissing her complaint, and to amend her complaint.[41] While these motions were pending, Foman initiated an appeal from the dismissal of her complaint by filing a notice of appeal to the Court of Appeals for the First Circuit.[42] The pendency of her motion to vacate judgment, however, rendered that notice ineffective.[43] Foman filed a second notice of appeal after the district court denied both of her motions.[44] Although this second notice referred to the orders denying her motions, it provided no indication that Foman sought to appeal from the dismissal of her complaint as well.[45] Consequently, with respect to the dismissal of her complaint, Foman had failed to comply with the mandate of then-Rule 73(b) of the Federal Rules of Civil Procedure that "[t]he notice of appeal . . . shall designate the judgment or part thereof appealed from."[46]

On appeal, the litigants briefed and argued the merits of the district court's dismissal of Foman's complaint as well as the denials of her motions.[47] The First Circuit nevertheless held that it lacked jurisdiction to review the dismissal of the complaint.[48] The court reasoned that neither of Foman's notices of appeal conferred jurisdiction over that ruling, the first notice having no effect and the second notice failing to indicate that she was taking appeal from the dismissal of her complaint.[49] The court thus limited its review to the denials of Foman's motions, affirming on both counts.[50]

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41. *Id.*

42. *Id.*

43. The First Circuit construed Foman's motion to vacate judgment as one brought under Rule 59(e) of the Federal Rules of Civil Procedure. *Id.* at 180. At that time, the pendency of a timely Rule 59 motion would have invalidated any notice of appeal filed prior to the disposition of the motion. *See* FED. R. CIV. P. 73(a), 28 U.S.C. app. (1958) (repealed 1968) (providing the rule in effect at the time of the case: "The running of the time for appeal is terminated . . . and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any [order] . . . granting or denying a motion under Rule 59 to alter or amend the judgment . . . .").

Under the current framework, a notice of appeal filed prior to the disposition of a timely Rule 59 motion is simply held in abeyance until the disposition of that motion and any related post-judgment motions. *See* FED. R. APP. P. 4(a)(4)(B)(i).

44. *Foman*, 371 U.S. at 179.

45. *Id.* at 180-81.

46. FED. R. CIV. P. 73(b), 28 U.S.C. app. (1958) (repealed 1968). Rule 3(c)(1)(B) of the Federal Rules of Appellate Procedure currently embodies this directive. *See supra* note 4 and accompanying text.

47. *Foman*, 371 U.S. at 179-80.

48. *See* Foman v. Davis, 292 F.2d 85, 87 (1st Cir. 1961).

49. *Id.* at 87-89.

50. *See id.* at 87.

The Supreme Court reversed the First Circuit's judgment, taking a tack that was rather charitable to Foman. At the outset of its analysis, the Court emphasized that "[t]he defect in [Foman's] second notice of appeal did not mislead or prejudice the [appellee]."[51] The Court reached that determination after exploring whether Foman had conveyed an intent to appeal from the dismissal of her complaint, finding that Foman's "intention to seek review of both the dismissal and the denial of the motions was manifest" when considering her two notices of appeal in conjunction with the litigants' briefs.[52] "Not only did both parties brief and argue the merits of the earlier judgment on appeal," the Court observed, "but [Foman's] statement of points on which she intended to rely on appeal . . . similarly demonstrated the intent to challenge the dismissal."[53] The Court was satisfied, therefore, that the First Circuit should have regarded Foman's second notice of appeal as "an effective, although inept, attempt to appeal from the judgment sought to be vacated."[54] The Court then concluded its analysis with the following sentiment:

> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.[55]

The precise basis for the Court's holding that Foman could appeal from the dismissal of her complaint, despite her failure to designate that ruling in her notice of appeal in accordance with then-Rule 73(b), is difficult to discern. On one hand, the Court seemed to espouse the narrow principle that noncompliance with a content requirement of a notice of appeal is excusable so long as the violation does not mislead or prejudice the appellee.[56] Applying that principle, the Court would have been unable to conclude that Foman's failure to designate the dismissal of her complaint in her only valid notice of appeal was misleading or prejudicial, considering that Foman had manifested an intent to appeal from that ruling through her other submissions.

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51. *Foman*, 371 U.S. at 181.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 181-82 (citation and internal quotation marks omitted).

56. *See id.* at 181 (observing that "[t]he defect in the second notice of appeal did not mislead or prejudice the [appellee]").

On the other hand, *Foman* is susceptible to a much broader reading in light of the Court's concluding rhetoric. By characterizing Foman's violation of then-Rule 73(b)'s judgment-designation requirement as a mere technicality and stressing that a court's refusal to consider the merits of an appeal on that basis would be "entirely contrary to the spirit of the Federal Rules of Civil Procedure,"[57] the Court strongly suggested that a failure to comply with a content requirement of the notice of appeal should virtually never result in dismissal of an appeal. The Court's subsequent statement that "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits" only serves to support such a reading.[58] Accordingly, the Court likely would have reached the merits of Foman's appeal from the dismissal of her complaint even if her failure to designate that ruling in her notice of appeal had indeed been misleading or prejudicial to the appellee.

B. A Change of Course in Torres v. Oakland Scavenger Co.

Regardless of the intended effect of *Foman*, the Court dramatically altered its conception of the content requirements of the notice of appeal twenty-six years later in *Torres v. Oakland Scavenger Co.*[59] *Torres* involved a suit in which sixteen individuals intervened as plaintiffs after the original plaintiffs to the suit executed a settlement agreement with the defendant.[60] Following the district court's dismissal of their complaint, the plaintiff-intervenors filed a notice of appeal to the Court of Appeals for the Ninth Circuit.[61] The caption of the notice set forth the name of a single plaintiff-intervenor, followed by the phrase "et al."[62] The body of the notice listed the names of each plaintiff-intervenor in alphabetical sequence, with the exception of Jose Torres.[63] The notice's omission of Torres's name ostensibly resulted from a simple oversight on the part of his counsel's secretary.[64] Notwithstanding the inadvertent nature of the omission, the Supreme Court held that the Ninth Circuit lacked jurisdiction over the appeal as it pertained to Torres.[65]

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57. *Id.*
58. *See id.* at 181-82 (citation and internal quotation marks omitted).
59. 487 U.S. 312 (1988).
60. *Id.* at 313.
61. *Id.*
62. Brief for Petitioners at 6, *Torres*, 487 U.S. 312 (No. 86-1845), 1987 WL 880529.
63. *Id.*
64. *Torres*, 487 U.S. at 313; Brief for Petitioners, *supra* note 62, at 6.
65. *Torres*, 487 U.S. at 317.

1. Rule 3(c): Party-Specification Requirement

The Court applied a fairly rigid analysis in determining that the notice of appeal in question did not "specify" Torres as mandated by Rule 3(c) of the Federal Rules of Appellate Procedure.[66] In the process, the Court addressed its prior approach in *Foman* simply by accepting what it characterized as "the important principle for which *Foman* stands,"[67] namely, "that the requirements of the rules of procedure should be liberally construed and that 'mere technicalities' should not stand in the way of consideration of a case on its merits."[68] Accordingly, the Court continued, a litigant's filing that is "technically at variance with the letter of a procedural rule" might nevertheless comply with that rule if the filing constitutes "the functional equivalent of what the rule requires."[69] But Torres, in the Court's view, had failed to file even the functional equivalent of a notice of appeal, considering that "he was never named or otherwise designated, however inartfully [sic], in the notice of appeal filed by the 15 other intervenors."[70] The Court thus determined that Torres did not satisfy Rule 3(c)'s party-specification requirement, "even liberally construed."[71]

In so ruling, the Court rejected Torres's assertion that the inclusion of the phrase "et al." in the caption of the notice of appeal had the effect of satisfying Rule 3(c)'s party-specification requirement.[72] Noting that "[t]he purpose of the

66. FED. R. APP. P. 3(c), 28 U.S.C. app. (1982) (amended 1993) ("The notice of appeal shall specify the party or parties taking the appeal . . . ."). The party-specification requirement is now contained in Rule 3(c)(1)(A). *See supra* note 2 and accompanying text.

67. *Torres*, 487 U.S. at 316.

68. *Id.* (quoting Foman v. Davis, 371 U.S. 178, 181 (1962)). While explicitly referring to *Foman*'s statement that "[i]t is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities," *Foman*, 371 U.S. at 181, the *Torres* Court omitted any reference to a significant aspect of the immediately following statement in *Foman*, specifically, that "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome." *Id.* at 181-82 (citation and internal quotation marks omitted). *See Torres*, 487 U.S. at 316. Presumably, the Court's omission was deliberate, considering that *Torres* turned out to be a case in which "one misstep by counsel [was] decisive to the outcome." *See Foman*, 371 U.S. at 181-82.

69. *Torres*, 487 at 316-17 (citing Houston v. Lack, 487 U.S. 266 (1988)).

70. *Id.* at 317.

71. *Id.*

72. *See id.* at 317-18. Although agreeing with the Court that the notice of appeal's inclusion of the phrase "et al." did not effectively "specify" Torres pursuant to Rule 3(c), Justice Scalia opined that the principles espoused by the Court should have led to a contrary conclusion. *See id.* at 318-19 (Scalia, J., concurring in the judgment) ("If it is the fact that the requirements of the rules of procedure should be 'liberally construed,' that 'mere technicalities should not stand in the way of consideration of a case on its merits,' and that a rule is complied with if 'the litigant's action is the functional equivalent of what the rule requires,' it would seem

specificity requirement is to provide notice both to the opposition and to the court of the identity of the appellant or appellants,"[73] the Court explained that the requirement could be met "only by some designation that gives fair notice of the specific individual or entity seeking to appeal."[74] The Court found that "[t]he use of the phrase 'et al.,' which literally means 'and others,' utterly fails to provide such notice to either intended recipient."[75] If such a "vague designation" were sufficient, the Court elaborated, "the appellee and the court [would be] unable to determine with certitude whether a losing party not named in the notice of appeal should be bound by an adverse judgment or held liable for costs or sanctions."[76]

2. A Jurisdictional Conception of Rule 3(c)'s Requirements

Although the Court's analysis regarding Torres's noncompliance with Rule 3(c)'s party-specification requirement was significant, the most profound implications of *Torres* emerge from its conception of Rule 3(c)'s requirements as jurisdictional in nature.[77] In this respect, the Court, as it did in *Robinson* almost thirty years earlier, relied principally upon the inability of the courts of appeals to enlarge the time in which a litigant must file a notice of appeal.[78] The

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to me that a caption listing the first party to the case and then adding 'et al.' is enough to suggest that all parties are taking the appeal; and that the later omission of one of the parties in listing the appellants can, 'liberally viewed,' be deemed to create no more than an ambiguity which does not destroy the effect of putting the appellee on notice." (internal citation omitted)).

73. *Id.* at 318 (majority opinion).

74. *Id.*

75. *Id.*

76. *Id.* Rule 3(c) has since been amended to allow for the specification of a party using the phrase "et al." *See infra* note 148 and accompanying text.

77. For a discussion of pre-*Torres* cases addressing the nature of Rule 3(c)'s party-specification requirement, see Nancy J. Gegenheimer, *Party Names on the Notice of Appeal: Strict Adherence to Federal Appellate Rule 3 After* Torres v. Oakland Scavenger Company, 69 DENV. U. L. REV. 725, 730-32 (1992); Jeffrey L. Kirchmeier, Case Note, Torres v. Oakland Scavenger Co.: *What's in a Name?—Everything in a Federal Appeal*, 39 CASE W. RES. L. REV. 943, 945-48 (1989). *See also* Kenneth J. Servay, *The 1993 Amendments to Rules 3 and 4 of the Federal Rules of Appellate Procedure—A Bridge over Troubled Water—Or Just Another Trap?*, 157 F.R.D. 587, 589 nn.17-18 (1994) (collecting cases).

78. The operative provision in *Torres* was Rule 26(b) of the Federal Rules of Appellate Procedure, which provided the following:

> The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; *but the court may not enlarge the time for filing a notice of appeal* . . . .

FED. R. APP. P. 26(b), 28 U.S.C. app. (1982) (amended 1998) (emphasis added). The current version of Rule 26(b), although stylistically and structurally different, has retained the same substance. *See* FED. R. APP. P. 26(b)(1) ("For good cause, the court may extend the time

Court was particularly concerned that "the mandatory nature of the time limits contained in Rule 4 would be vitiated if courts of appeals were permitted to exercise jurisdiction over parties not named in the notice of appeal."[79] The Court explained that, once the time to file a notice of appeal has elapsed, the exercise of appellate jurisdiction over parties not specified in the notice would be tantamount to extending the time to file the notice in the first instance.[80] "Because the Rules do not grant courts the latter power," the Court reasoned, "we hold that the Rules likewise withhold the former."[81]

The Court found further support for its jurisdictional conception of Rule 3(c)'s requirements in the relationship between Rule 3(c) and Rule 4.[82] In particular, the Court deemed Rule 3(c)'s content requirements and Rule 4's timing requirements as inextricably linked, based upon its reading of the following statement issued by the Advisory Committee on the Federal Rules of Appellate Procedure at the time of Rule 3's adoption:

> Rule 3 and Rule 4 combine to require that a notice of appeal be filed with the clerk of the district court within the time prescribed for taking an appeal. Because the timely filing of a notice of appeal is mandatory and jurisdictional, compliance with the provisions of those rules is of the utmost importance.[83]

The Court emphasized that the Advisory Committee's admonition did not distinguish the respective requirements of Rule 3 and Rule 4, but instead "treats the requirements of the two Rules as a single jurisdictional threshold."[84] The Court was satisfied, therefore, that the Advisory Committee itself regarded Rule 3(c) as a jurisdictional prerequisite.[85]

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prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. *But the court may not extend the time to file . . . a notice of appeal (except as authorized in Rule 4)* . . . ." (emphasis added)).

79. *Torres*, 487 U.S. at 315.

80. *Id.* ("Permitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal.").

81. *Id.*

82. *Id.*

83. *Id.* (internal quotation marks and citation omitted) (quoting FED. R. APP. P. 3 advisory committee's note (1967 Adoption)).

84. *Id.*

85. *Id.* at 316 ("Our conclusion that the Advisory Committee viewed the requirements of Rule 3 as jurisdictional in nature, although not determinative, is of weight in our construction of the Rule." (internal quotation marks omitted)).

In dissent, Justice Brennan strenuously disagreed with the Court's interpretation of the Advisory Committee's statements:

> The comment itself says only that the "timely filing" requirement is mandatory and

In light of its jurisdictional conception of Rule 3(c)'s requirements, the Court concluded that the unavoidable consequence of Torres's failure to abide by the party-specification requirement was dismissal of his appeal. Even though the dismissal resulted solely from a deficiency in the notice of appeal at issue, the Court found no solace for Torres in Rule 3(c)'s safeguard that "[a]n appeal shall not be dismissed for informality of form or title of the notice of appeal."[86] The Court explained summarily that "[t]he failure to name a party in a notice of appeal is more than excusable 'informality'; it constitutes a failure of that party to appeal."[87]

The Court offered two additional observations of note in connection with its understanding of Rule 3(c)'s requirements as jurisdictional in nature. First, in rejecting Torres's contention that a deficiency in a notice of appeal ought to be subject to review for "harmless error," the Court highlighted that the contention "misunderstands the nature of a jurisdictional requirement: a litigant's failure to clear a jurisdictional hurdle can never be 'harmless' or waived by a court."[88] Second, the Court explicitly acknowledged that its jurisdictional understanding of Rule 3(c) had produced "a harsh result in this case."[89] The Court's

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> jurisdictional; significantly, the Advisory Committee stopped short of describing Rules 3 and 4 as jurisdictional in their entirety. Moreover, it is apparent from the context that the Advisory Committee did not intend to incorporate by reference every requirement of the two Rules, but rather, only those provisions discussed in the first sentence of the comment. Rule 3(a) provides that an appeal "shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4." It is thus this provision — which is tracked nearly word for word in the Advisory Committee Note — and not every enumerated requirement of Rule 3, that combines with Rule 4 to form the jurisdictional requirement "that a notice of appeal be filed with the clerk of the district court within the time prescribed for taking an appeal."

Id. at 322 (Brennan, J., dissenting).

86. FED. R. APP. P. 3(c), 28 U.S.C. app. (1982) (amended 1993). The provision in question currently reads: "An appeal must not be dismissed for informality of form or title of the notice of appeal, *or for failure to name a party whose intent to appeal is otherwise clear from the notice.*" FED. R. APP. P. 3(c)(4) (emphasis added). The emphasized language was added in response to *Torres*. *See infra* text accompanying notes 153-55.

87. *Torres*, 487 U.S. at 314.

88. *Id.* at 317 n.3. Notwithstanding the *Torres* Court's emphasis that Rule 3(c)'s jurisdictional requirements cannot be waived, one prominent treatise has opined that courts should nonetheless waive violations of the judgment-designation requirement in the appropriate circumstances. *See* 20 MOORE ET AL., *supra* note 2, § 303.21[3][c][ii] ("Although the holding of *Torres* made clear that the requirements of Appellate Rule 3 are jurisdictional, a technical mistake in naming the order appealed from should not deprive the court of jurisdiction as long as the intent to appeal from the order or judgment can be inferred from the record as a whole and the opposing party cannot show prejudice.").

89. *Torres*, 487 U.S. at 318.

conscience was eased, however, to the extent that "the harshness of our construction is imposed by the legislature and not by the judicial process."[90]

3. Sidestepping Foman

The most intriguing aspect of the *Torres* Court's jurisdictional approach to Rule 3(c)'s requirements was its failure to adequately address the forgiving approach established in *Foman*. The Court's only treatment of *Foman* in this regard was to assert that there was no need in *Foman* to consider whether the judgment-designation requirement of then-Rule 73(b)[91] was jurisdictional in nature,[92] given the *Foman* Court's purported conclusion that "in light of all the circumstances, the Rule had been complied with."[93] This assertion is dubious at best, however, considering the principal finding in *Foman* that "[t]he defect in [Foman's] second notice of appeal did not mislead or prejudice the [appellee]."[94] Indeed, the *Foman* Court explored whether Foman's second notice of appeal had misled or prejudiced the appellee precisely because that notice had *failed* to comply with the judgment-designation requirement at issue.

Regardless of whether the *Torres* Court was willing to acknowledge it, the fact remains that its jurisdictional conception of Rule 3(c)'s requirements wholly repudiated the principles upon which *Foman* rested. Had the *Torres* Court desired to adhere to *Foman*, its determination that Torres had failed to comply with Rule 3(c)'s party-specification requirement would have been followed by an examination of whether that noncompliance had misled or prejudiced the appellee.[95] Such an approach, however, is entirely contrary to a jurisdictional conception of Rule 3(c), particularly in view of the *Torres* Court's admonition

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90. *Id.* (internal quotation marks and citation omitted).

91. The *Torres* Court erroneously cited Rule 3(c) as the operative rule in *Foman*. *See id.* at 316 ("*Foman* did not address whether the requirement of Rule 3(c) at issue in that case was jurisdictional in nature . . . ."). In fact, the promulgation of Rule 3 did not occur until several years after *Foman* was decided. *See* FED. R. APP. P. 3 advisory committee's note (1967 Adoption).

92. While the *Torres* majority was satisfied that *Foman* had not addressed whether Rule 3(c)'s judgment-designation requirement was jurisdictional in nature, Justice Brennan insisted that *Foman* had rejected that understanding. *Compare Torres*, 487 U.S. at 316 ("*Foman* did not address whether the requirement of Rule 3(c) at issue in that case was jurisdictional in nature . . . ."), *with id.* at 322 (Brennan, J., dissenting) (depicting *Foman* as holding that "Rule 3(c)'s judgment-designation requirement is not jurisdictional").

93. *Id.* at 316 (majority opinion). In making this determination, the *Torres* Court appeared to rely primarily upon the statement that Foman's second notice of appeal should have been regarded as "an effective, although inept, attempt to appeal from the judgment sought to be vacated," Foman v. Davis, 371 U.S. 178, 181 (1962).

94. *Foman*, 371 U.S. at 181.

95. *See id.*

that "a litigant's failure to clear a jurisdictional hurdle can never be 'harmless' or waived by a court."[96]

Nor can the spirit animating *Foman*'s concluding rhetoric be reconciled with a jurisdictional conception of Rule 3(c)'s requirements. As observed above, the *Foman* Court equated noncompliance with the content requirements of a notice of appeal as a "mere technicality" that should not preclude the consideration of appeal on the merits.[97] The Court also suggested that the outcome of an appeal must not hinge on "one misstep by counsel."[98] These ideals, however, are plainly incompatible with the *Torres* Court's holding that a court of appeals lacked jurisdiction over a litigant's appeal solely because his counsel's secretary mistakenly omitted his name from a notice of appeal. Yet, as the *Torres* Court noted, its conception of Rule 3(c) as a jurisdictional prerequisite compelled this admittedly harsh disposition.[99]

C. The Affirmation of the Jurisdictional Conception of Rule 3(c)

Notwithstanding any inconsistencies with *Foman*, the *Torres* Court's conception of Rule 3(c) as a jurisdictional prerequisite has endured. First, in two post-*Torres* cases involving allegedly defective notices of appeal, the Court has expressly described Rule 3(c)'s requirements as jurisdictional in nature.[100] Second, the Advisory Committee on the Federal Rules of Appellate Procedure has posed no challenge to the *Torres* Court's conclusion that the committee itself understood Rule 3(c)'s requirements to be jurisdictional in nature at the time of Rule 3's adoption.[101] Instead, the committee's sole response to *Torres* has been to amend Rule 3(c) in order to facilitate compliance with the party-specification requirement.

1. The Court Stands by Torres

The Supreme Court's initial affirmation of *Torres* occurred in *Smith v. Barry*.[102] *Smith* involved a suit brought by William Smith, a state prisoner, in which he asserted that various prison officials had violated his rights under the Eighth and Fourteenth Amendments.[103] At the conclusion of trial, the jury returned a verdict in favor of Smith solely regarding his claims against two

96. *Torres*, 487 U.S. at 317 n.3.

97. *Foman*, 371 U.S. at 181.

98. *Id.* at 181-82.

99. *See supra* text accompanying note 89.

100. *See* Becker v. Montgomery, 532 U.S. 757, 765 (2001); Smith v. Barry, 502 U.S. 244, 248 (1992).

101. *See supra* notes 82-85 and accompanying text.

102. 502 U.S. 244.

103. *Id.* at 245.

prison psychologists.[104] The psychologists then timely moved for judgment notwithstanding the verdict pursuant Rule 50(b) of the Federal Rules of Civil Procedure.[105] While that motion was pending, Smith, acting pro se, filed a notice of appeal to the Court of Appeals for the Fourth Circuit.[106] Smith's notice, however, met the same fate as did the first notice of appeal in *Foman*: the pendency of a post-judgment motion rendered the notice ineffective.[107]

Despite the ineffectiveness of Smith's notice of appeal, the Clerk of the Fourth Circuit responded to the filing by issuing to the litigants briefing forms used in pro se appeals to determine the necessity of an appointment of counsel and/or oral argument.[108] Smith completed the form and returned it to the court within the deadline required for the timely filing of a notice of appeal under Rule 4.[109] Although later conceding the ineffectiveness of his original notice of appeal,[110] Smith opposed dismissal of his appeal on the ground that the briefing form "effectively substituted for a second notice of appeal."[111]

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104. *Id.* at 245-46.

105. *Id.* at 246.

106. *Id.* The only ruling that Smith had designated in this notice of appeal was an order extending the time in which Smith had to file a motion for attorney fees. *See* Smith v. Galley, 919 F.2d 893, 896 n.7 (4th Cir. 1990), *rev'd sub nom.* Smith v. Barry, 502 U.S. 244 (1992).

107. FED. R. APP. P. 4(a)(4), 28 U.S.C. app. (1988) (amended 1993) ("If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party . . . for judgment under Rule 50(b)[,] . . . the time for appeal for all parties shall run from the entry of the order . . . granting or denying any other such motion. *A notice of appeal filed before the disposition of any of the above motions shall have no effect.* A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above." (emphasis added)).

108. *Smith*, 502 U.S. at 246.

109. *Id.* at 246-47.

110. *Smith*, 919 F.2d at 895.

111. *Id.* Rule 3(a) required that Smith file his notice of appeal with the district court. *See* FED. R. APP. P. 3(a), 28 U.S.C. app. (1988) (amended 1989) ("An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4."). Still, his act of filing the briefing form directly with the Fourth Circuit would not by itself have defeated his argument that the form substituted as a notice of appeal. Under Rule 4(a)(1), a notice of appeal erroneously filed with the court of appeals would have been deemed filed with the district court on the date that it was filed with the court of appeals. *Id.* 4(a)(1), 28 U.S.C. app. (1988) (amended 1993). Rule 4(d) currently embodies the substance of this provision. *See* FED. R. APP. P. 4(d) ("If a notice of appeal in either a civil or criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.").

The Fourth Circuit rejected Smith's argument and dismissed his appeal accordingly.[112] Relying upon *Torres*, the court identified the pertinent issue as whether Smith's briefing form was "the 'functional equivalent' of a notice of appeal under Rule 3(c)."[113] The court answered in the negative, explaining that "the document was not the result of Smith's intent to initiate an appeal,"[114] but instead constituted Smith's effort to comply with an order of the court issued subsequent to the filing of an ineffective notice of appeal.[115]

In reversing the Fourth Circuit's judgment, the Supreme Court determined that Smith's briefing form, or virtually any document for that matter, has the potential to serve as the functional equivalent of a notice of appeal.[116] The Court recognized that a notice of appeal "must specifically indicate the litigant's intent

112. *Smith*, 919 F.2d at 896.

113. *Id.* at 895 (quoting Torres v. Oakland Scavenger Co., 487 U.S. 312, 317 (1988)).

114. *Id.* at 895-96.

115. *Id.* at 896.

116. Smith v. Barry, 502 U.S. 244, 248-49 (1992). Since *Smith* was decided, the courts of appeals have deemed a variety of documents as the "functional equivalent" of a notice of appeal, including: a motion for extension of time to file a notice of appeal, *see, e.g.*, Rinaldo v. Corbett, 256 F.3d 1276, 1278-80 (11th Cir. 2001); a motion for certificate of probable cause, *see, e.g.*, Rodgers v. Wyo. Att'y Gen., 205 F.3d 1201, 1204-06 (10th Cir. 2000), *overruled on other grounds by* Moore v. Marr, 254 F.3d 1235, 1239 (10th Cir. 2001); a petition for permission to appeal, *see, e.g.*, Manion v. Am. Airlines, Inc., 395 F.3d 428, 431 (D.C. Cir. 2004); a petition for writ of mandamus, *see, e.g.*, *In re* SDDS, Inc., 97 F.3d 1030, 1034 (8th Cir. 1996); a motion for appointment of counsel, *see, e.g.*, Campiti v. Matesanz, 333 F.3d 317, 320 (1st Cir. 2003); a motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure, *see, e.g.*, Hatfield v. Bd. of County Comm'rs for Converse County, 52 F.3d 858, 860-62 (10th Cir. 1995); a motion to proceed in forma pauperis, *see, e.g.*, Nichols v. United States, 75 F.3d 1137, 1140-41 (7th Cir. 1996); a petition for common-law writ of certiorari, *see, e.g.*, *In re* Urohealth Sys., Inc., 252 F.3d 504, 506-08 (1st Cir. 2001); a motion for certificate of appealability, *see, e.g.*, Marmolejo v. United States, 196 F.3d 377, 378 (2d Cir. 1999) (per curiam); a motion for leave to file a successive motion to attack sentence under 28 U.S.C. § 2255, *see, e.g.*, *In re* Davenport, 147 F.3d 605, 607-08 (7th Cir. 1998); a designation of record on appeal, *see, e.g.*, United States v. Adams, 106 F.3d 646, 647 (5th Cir. 1997); a motion for clarification of a ruling, *see, e.g.*, Barrett v. United States, 105 F.3d 793, 795-96 (2d Cir. 1996) (per curiam); an opening brief on appeal, *see, e.g.*, Intel Corp. v. Terabyte Int'l, Inc., 6 F.3d 614, 617-18 (9th Cir. 1993); and a motion for reduction of sentence, *see, e.g.*, Brannan v. United States, 993 F.2d 709, 710 (9th Cir. 1993). *See also* 20 MOORE ET AL., *supra* note 2, § 303.21[2] (enumerating various documents that have been found to constitute the functional equivalent of a notice of appeal); DAVID G. KNIBB, FEDERAL COURT OF APPEALS MANUAL § 8.5 (4th ed. 2000 & Supp. 2005) (same). *But see* S.M. v. J.K., 262 F.3d 914, 922-23 (9th Cir. 2001) (concluding that a docketing statement could not serve as the "functional equivalent" of a notice of cross-appeal because the plaintiff had provided no reason why the court should exercise its discretion to do so); Harris v. Ballard, 158 F.3d 1164, 1166 (11th Cir. 1998) (per curiam) (concluding that a motion for extension of time to file a notice of appeal cannot serve as the "functional equivalent" of a notice of appeal because it does not express an intention to appeal).

to seek appellate review," pointing out that "the purpose of this requirement is to ensure that the filing provides sufficient notice to the other parties and the courts."[117] Insisting that a document's sufficiency as a notice of appeal is a function of the notice that it affords, and not of a litigant's subjective motivation in filing it, the Court rejected the Fourth Circuit's reliance on Smith's purpose for submitting the briefing form.[118] "If a document filed within the time specified by Rule 4 gives the notice required by Rule 3," the Court concluded, "it is effective as a notice of appeal."[119]

A striking feature of the Court's analysis in *Smith* was its express affirmation of the *Torres* Court's understanding of Rule 3(c) as a jurisdictional prerequisite. Noting that the "principle of liberal construction" allowing a court of appeals to regard a document as the functional equivalent of a notice of appeal does not excuse noncompliance with Rule 3(c),[120] the Court made clear that "Rule 3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review."[121] "Although courts should construe Rule 3 liberally when determining whether it has been complied with," the Court continued, "noncompliance is fatal to an appeal."[122]

Applying these principles to the circumstances before it, the Court held that the content of Smith's briefing form would determine the Fourth Circuit's jurisdiction over his appeal.[123] In particular, the Court observed that the appellees had challenged the validity of Smith's briefing form as a notice of appeal on the basis that it failed to satisfy the requirements of Rule 3(c).[124]

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117. *Smith*, 502 U.S. at 248.

118. *Id.*

119. *Id.* at 248-49 (stating further that the Federal Rules "do not preclude an appellate court from treating a filing styled as a brief as a notice of appeal . . . if the filing is timely under Rule 4 and conveys the information required by Rule 3(c)").

120. *Id.* at 248.

121. *Id.* (citing Torres v. Oakland Scavenger Co., 487 U.S. 312, 316-17 (1988)). In determining whether a specific document qualifies as the "functional equivalent" of a notice of appeal, some courts of appeals have been more careful than others to ensure that the document satisfies Rule 3(c)'s requirements. *Compare Campiti*, 333 F.3d at 320 ("Admittedly, the document does not specify the judgment appealed from or the appellate court; but here, where no doubt exists as to either, Rule 3 buttressed by latitude for a pro se litigant forgives these 'informalit[ies] of form.'" (quoting FED. R. APP. P. 3(c)(4)) (alteration in original)), *with* Andrade v. Att'y Gen. of Cal., 270 F.3d 743, 752 (9th Cir. 2001), *rev'd on other grounds*, 538 U.S. 63 (2003) ("Andrade's motion for extension of time satisfied the three notice requirements of Rule 3(c)(1): it identified the judgment at issue, it specified the court to which the appeal would be taken, and it was delivered to both the district court and the opposing party.").

122. *Smith*, 502 U.S. at 248.

123. *Id.* at 249.

124. *Id.* at 250 (noting the respondents' contention that "Smith's brief is not an adequate notice of appeal because it lacks information required by Rule 3(c)").

Because the Fourth Circuit had not addressed that issue, opting instead to dismiss the appeal on the ground that Smith's briefing form could not serve as the "functional equivalent" of a notice of appeal, the Court directed the Fourth Circuit to "undertake the appropriate analysis" on remand.[125]

Almost ten years after *Smith*, the Supreme Court again affirmed the *Torres* Court's jurisdictional understanding of Rule 3(c) in *Becker v. Montgomery*.[126] Dale Becker, acting pro se, brought an action to recover for alleged exposure to second-hand smoke while incarcerated in an Ohio prison.[127] After the district court dismissed his complaint, Becker filed a notice of appeal to the Court of Appeals for the Sixth Circuit.[128] Although the notice fulfilled the requirements of Rule 3(c),[129] Becker typed his name "[o]n the line tagged '(Counsel for Appellant)'" instead of signing it by hand.[130] The Sixth Circuit concluded that the notice's lack of a handwritten signature violated Rule 11(a) of the Federal Rules of Civil Procedure, and on that basis dismissed the appeal for lack of jurisdiction.[131]

In the Supreme Court's view, the Sixth Circuit had correctly concluded that Rule 11(a) obligated Becker to hand-sign his notice of appeal.[132] The Court thus

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125. *Id.* On remand, the appellees asserted that Smith had failed to comply with Rule 3(c)'s judgment-designation requirement because his briefing form simply sought "[a] new trial on all issues triable by Jury." Smith v. Barry, 985 F.2d 180, 183 (4th Cir. 1993) (alteration in original) (internal quotations omitted). The Fourth Circuit agreed with the appellees' position to the extent that Smith sought to appeal from the district court's *pretrial* dismissal of one of the defendants. *Id.* at 184 ("Dr. Barry's dismissal was not an issue triable by jury."). However, regarding Smith's effort to appeal from the district court's entry of a directed verdict in favor of six other defendants at the close of Smith's case, the Fourth Circuit construed the form as containing the "functional equivalent of the specifications required by Federal Rule of Appellate Procedure 3(c)" because the claim in question "went to trial before a jury." *Id.*

126. 532 U.S. 757 (2001).

127. *Id.* at 760.

128. *Id.* at 760-61.

129. *Id.* ("Using a notice of appeal form printed by the Government Printing Office, Becker filled in the blanks, specifying himself as sole appellant, designating the judgment from which he appealed, and naming the court to which he appealed." (citing FED. R. APP. P. 3(c)(1))).

130. *Id.* at 759-60.

131. *Id.* at 760-61. *See generally* FED. R. CIV. P. 11(a) ("Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, *shall be signed by the party.*" (emphasis added)). In so ruling, the Sixth Circuit relied upon its previous decision in *Mattingly v. Farmers State Bank*, 153 F.3d 336, 338 (6th Cir. 1998) (per curiam) (holding that the court lacked jurisdiction over the appeal because "[t]he notice of appeal was not signed, [and] the omission was not corrected within the 30-day appeal period of Fed. R.App. P. 4(a)(1)").

132. *See Becker*, 532 U.S. at 764 ("As Rule 11(a) is now framed, we read the requirement of a signature to indicate, as a signature requirement commonly does, and as it did in John Hancock's day, a name handwritten (or a mark handplaced).").

rejected Becker's contention that the appearance of his name in typewritten form on the notice was sufficient.[133] The Court was satisfied, however, that such a notice could withstand a violation of Rule 11(a)'s signature requirement "so long as the appellant promptly supplies the signature once the omission is called to his attention."[134] Because Becker eventually proffered a duplicate notice of appeal containing the requisite handwritten signature, the Court concluded that the Sixth Circuit had improperly dismissed his appeal for lack of jurisdiction.[135]

In so holding, the Court expressly affirmed the *Torres* Court's conception of Rule 3(c) as a jurisdictional prerequisite.[136] The Court distinguished Rule 11(a)'s signature requirement from the content and timing requirements contained in Rule 3 and Rule 4, respectively,[137] emphasizing that the latter two "are indeed linked *jurisdictional* provisions."[138] Observing that the signature requirement derives from Rule 11(a) as opposed to Rule 3(c), the Court determined that Rule 11(a) "alone calls for and controls that requirement and renders it nonjurisdictional."[139]

2. The Response of the Advisory Committee

In the wake of *Torres*, the courts of appeals began to demand meticulous compliance with Rule 3(c)'s party-specification requirement.[140] Given the *Torres* Court's characterization of the phrase "et al." as a "vague designation" that "utterly fails" to provide the requisite notice to the intended recipients,[141] a

133. *See id.* at 763.

134. *Id.* at 760. *See* FED. R. CIV. P. 11(a) ("An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.").

135. *Becker*, 532 U.S. at 765.

136. *Id.*

137. *Id.* at 765-66.

138. *Id.* at 765 (emphasis added); *see* Torres v. Oakland Scavenger Co., 487 U.S. 312, 315 (1988) ("This admonition by the Advisory Committee makes no distinction among the various requirements of Rule 3 and Rule 4; rather, it treats the requirements of the two Rules as a single jurisdictional threshold.").

139. *Id.* at 766; *see also* 20 MOORE ET AL., *supra* note 2, § 303.21[3][b][i] ("[S]ince a signature is not one of the jurisdictional requirements of Appellate Rule 3, but rather a nonjurisdictional requirement of Civil Rule 11, the omission of a signature from a notice of appeal does not deprive the circuit court of appellate jurisdiction.").

140. *See, e.g.*, Allen Archery, Inc. v. Precision Shooting Equip., Inc., 857 F.2d 1176, 1177 (7th Cir. 1988) (per curiam) (stating that "[*Torres*] requires us to insist on punctilious, literal, and exact compliance" with Rule 3(c)'s party-specification requirement). For additional discussion of post-*Torres* decisions applying Rule 3(c)'s party-specification requirement, see Gegenheimer, *supra* note 77, at 732-41. *See also* Servay, *supra* note 77, at 591-92 nn.38-39 (collecting cases).

141. *Torres*, 487 U.S. at 318.

notice of appeal's inclusion of "et al." usually provided no recourse to a prospective appellant whose name was not otherwise specified in the notice.[142] Nor could such a party, in the view of most courts of appeals, be effectively specified by a notice's use of a plural generic term such as "plaintiffs" or "defendants."[143] What is more, some courts held that the specification of a party

142. *See, e.g.*, Regalado v. City of Commerce City, 20 F.3d 1104, 1106 (10th Cir. 1994); Mallas v. United States, 993 F.2d 1111, 1116-17 (4th Cir. 1993); Moore v. Warehouse Club, Inc., 992 F.2d 27, 28 n.1 (3d Cir. 1993); Colle v. Brazos County, 981 F.2d 237, 240-43 (5th Cir. 1993); Gen. Elec. Co. v. Lehnen, 974 F.2d 66, 67 (8th Cir. 1992); Adkins v. Safeway Stores, Inc., 968 F.2d 1317, 1318-19 (D.C. Cir. 1992); Ooley v. Schwitzer Div., 961 F.2d 1293, 1305-06 (7th Cir. 1992); Buck v. U.S. Dep't of Agric., 960 F.2d 603, 603 n.1 (6th Cir. 1992); Walter v. Int'l Ass'n of Machinists Pension Fund, 949 F.2d 310, 312 (10th Cir. 1991); Pontarelli v. Stone, 930 F.2d 104, 108-09 (1st Cir. 1991); Worlds v. Dep't of Health and Rehab. Servs., Fla., 929 F.2d 591, 592-93 (11th Cir. 1991) (per curiam); United States v. Tucson Mech. Contracting, Inc., 921 F.2d 911, 913-14 (9th Cir. 1990); Baylis v. Marriot Corp., 906 F.2d 874, 877 (2d Cir. 1990); Baucher v. E. Ind. Prod. Credit Ass'n, 906 F.2d 332, 333-34 (7th Cir. 1990).

Notwithstanding the Supreme Court's determination that the use of "et al." in a notice of appeal failed to satisfy Rule 3(c)'s party-specification requirement, several courts of appeals recognized particular situations in which the phrase would suffice. For example, the Court of Appeals for the Fifth Circuit held that, in a case involving only two parties with standing to appeal, the inclusion of "et al." would specify the unnamed party. *See, e.g.*, Pope v. Miss. Real Estate Comm'n, 872 F.2d 127, 129 (5th Cir. 1989) (per curiam). Moreover, the Court of Appeals for the Ninth Circuit considered the inclusion of "et al." as sufficient to satisfy the party-specification requirement when the body of the notice of appeal also contained a plural generic term such as "plaintiffs" or "defendants." *See, e.g.*, Benally v. Hodel, 940 F.2d 1194, 1197 (9th Cir. 1990). On occasion, the court found that the plural generic term sufficed on its own. *See, e.g.*, Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320, 1323 (9th Cir. 1991).

Interestingly, although "et al." typically was not an effective means of specifying a party whose name did not otherwise appear in a notice of appeal, the Court of Appeals for the D.C. Circuit held that the use of the Latin phrase "et ux." (meaning "and wife") immediately after a litigant's name was sufficient to specify his wife. Milanovich v. Costa Crociere, 938 F.2d 297, 298 (D.C. Cir. 1991) (per curiam). The court reasoned that, while "et al." might refer to "an entire class of unnamed individuals or just to some members of that class," the phrase "et ux." could refer only to the wife of the specified appellant. *Id.*

143. *See, e.g.*, *Mallas*, 993 F.2d at 1116-17; *Colle*, 981 F.2d at 242; *Lehnen*, 974 F.2d at 67; *Adkins*, 968 F.2d at 1319; *Pontarelli*, 930 F.2d at 108-09; Pratt v. Petroleum Prod. Mgmt., Inc. Employee Sav. Plan & Trust, 920 F.2d 651, 654-55 (10th Cir. 1990); Pride v. Venango River Corp., 916 F.2d 1250, 1251-53 (7th Cir. 1990); Minority Employees of the Tenn. Dep't of Employment Sec., Inc. v. Tenn. Dep't of Employment Sec., 901 F.2d 1327, 1332 (6th Cir. 1990) (en banc).

The Court of Appeals for the First Circuit went so far as to conclude that the use of terms such as "all plaintiffs" or "all defendants" in a notice of appeal was not sufficient to satisfy the party-specification requirement. *See* Santos-Martinez v. Soto-Santiago, 863 F.2d 174, 175-76 (1st Cir. 1988).

was valid only when appearing in the body of a notice of appeal, as opposed to its caption.[144]

The post-*Torres* insistence upon scrupulous compliance with Rule 3(c)'s party-specification requirement posed particular problems for litigants who sought to appeal on behalf of other parties in addition to themselves. In the context of a class action (or putative class action), most courts of appeals did not consider a notice of appeal's specification of a class representative, without some mention of the representative's status, as encompassing the class members.[145] Moreover, a notice's specification of one litigant typically was not regarded as a sufficient means of specifying members of that litigant's family as well.[146]

In an effort to relax some of the exacting standards of compliance that many courts of appeals had begun to enforce after *Torres*, the Advisory Committee on the Federal Rules of Appellate Procedure crafted a series of amendments to Rule 3(c), which took effect in December 1993.[147] Under the Rule as amended, an attorney representing various parties in a case could specify each of them using the phrase "et al.," or with a plural generic term such as "the defendants" or "all plaintiffs."[148] The amended Rule also provided that the inclusion of the

144. *See, e.g.*, All Pac. Trading, Inc. v. Vessel M/V Hanjin Yosu, 7 F.3d 1427, 1430 (9th Cir. 1993); *Allen Archery*, 857 F.2d at 1177. *But see* James v. United States, 970 F.2d 750, 752 n.3 (10th Cir. 1992) (referring to the caption in determining whether the party-specification requirement had been met); Samaad v. City of Dallas, 922 F.2d 216, 220 (5th Cir. 1991) (same); Hartford Cas. Ins. Co. v. Borg-Warner Corp., 913 F.2d 419, 423-24 (7th Cir. 1990) (same); *In re* Grand Jury Proceedings, 875 F.2d 927, 931 (1st Cir. 1989) (same).

145. *See, e.g.*, Griffith v. Sullivan, 987 F.2d 25, 27 (1st Cir. 1993); Hammon v. Kelly, 980 F.2d 785, 786-87 (D.C. Cir. 1992); *Ooley*, 961 F.2d at 1305-06; Reed v. Int'l Union of United Auto., Aerospace & Agric. Implement Workers of Am., 945 F.2d 198, 199 n.1 (7th Cir. 1991). *But see* Al-Jundi v. Estate of Rockefeller, 885 F.2d 1060, 1061 n.1 (2d Cir. 1989) (amended complaint's listing of all plaintiffs as "representatives of the plaintiff class" specified the class members by implication in the notice of appeal); Rendon v. AT&T Techs., 883 F.2d 388, 398 n.8 (5th Cir. 1989) (inclusion of "et al." immediately after the name of the class representatives specified the remaining members of that class).

146. *See, e.g.*, *Regalado*, 20 F.3d at 1106; *Buck*, 960 F.2d at 603 n.1. *Contra Colle*, 981 F.2d at 241 (notice of appeal's specification of a parent encompasses a child on whose behalf the parent sues).

147. For a critical assessment of these amendments, see Servay, *supra* note 77, at 593-97. *See generally* FED. R. APP. P. 3(c) advisory committee's note (1993 Amendments). Many courts of appeals retroactively applied these amendments in order to sustain appellate jurisdiction over litigants who otherwise would not have satisfied the party-specification requirement after *Torres*. *E.g.*, Barbour v. Merrill, 48 F.3d 1270, 1275-76 (D.C. Cir. 1995); Frey v. City of Herculaneum, 44 F.3d 667, 670 n.1 (8th Cir. 1995); Cleveland v. Porca Co., 38 F.3d 289, 293-94 (7th Cir. 1994); Dodger's Bar & Grill, Inc. v. Johnson County Bd. of County Comm'rs, 32 F.3d 1436, 1440-41 (10th Cir. 1994); Garcia v. Wash, 20 F.3d 608, 609-10 (5th Cir. 1994).

148. FED. R. APP. P. 3(c)(1)(A) (stating that the party-specification requirement is satisfied

party's name solely in the notice's caption would suffice.[149] It follows that, had these amendments been in force at the time of *Torres*, the notice of appeal at issue in that matter would have effectively specified Jose Torres despite its failure to list his name in the body.[150]

The amended rule also makes clear that, in certain instances, the specification of one party in a notice of appeal will specify other related parties whose names did not otherwise appear in a notice of appeal. In particular, a notice's specification of a single class representative in the context of a class action — or putative class action — encompasses each member of the pertinent class.[151] Moreover, the specification of a party who proceeds pro se presumptively encompasses his or her spouse and minor children.[152]

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when "an attorney representing more than one party . . . describe[s] those parties with such terms as 'all plaintiffs,' 'the defendants,' 'the plaintiffs A, B, et al.,' or 'all defendants except X'"); *see also id.* 3(c) advisory committee's note (1993 Amendments) (stating that "in order to prevent the loss of a right to appeal through inadvertent omission of a party's name or continued use of such terms as 'et al.,' which are sufficient in all district court filings after the complaint, the amendment allows an attorney representing more than one party the flexibility to indicate which parties are appealing without naming them individually").

Despite this amendment, a notice of appeal's use of a plural generic term will not necessarily suffice to specify the pertinent individual parties. For example, the First Circuit has held that a notice of appeal referencing "the consolidated plaintiffs" did not specify the individual parties who made up that group because the notice was filed by an attorney who did not represent them. *See* Schneider v. Colegio de Abogados de P.R., 187 F.3d 30, 58-59 & n.48 (1st Cir. 1999) (per curiam).

149. FED. R. APP. P. 3(c)(1)(A) (stating that the party-specification requirement is satisfied "by naming each [party] in the caption or body of the notice"). *See, e.g.*, Spain v. Bd. of Educ. of Meridian Cmty. Unit Sch. Dist. No. 101, 214 F.3d 925, 929 (7th Cir. 2000) (relying upon Rule 3(c)(1)(A) in concluding that the party-specification requirement was satisfied even though the appellant's name appeared in the caption, but not in the body, of the notice of appeal).

150. *See supra* text accompanying notes 62-64.

151. FED. R. APP. P. 3(c)(3) ("In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class."); *see id.* 3(c) advisory committee's note (1993 Amendments).

Although this amendment has facilitated compliance with the party-specification requirement in class actions, there is still room for error. In particular, the Seventh Circuit has held that a notice of appeal will specify an entire class (or putative class) of individuals only if it specifies at least one individual qualified to appeal on behalf of that class, *see* Clay v. Fort Wayne Cmty. Schs., 76 F.3d 873, 876-77 (7th Cir. 1996), and expressly states that the individual in question is appealing as a class representative, *see* Murphy v. Keystone Steel & Wire Co., 61 F.3d 560, 569-71 (7th Cir. 1995).

152. FED. R. APP. P. 3(c)(2) ("A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise."); *see id.* 3(c) advisory committee's note (1993 Amendments); *see also* Ms. S. v. Vashon Island Sch. Dist., 337 F.3d 1115, 1119 n.15 (9th Cir. 2003) (relying upon Rule 3(c)(2) in concluding that the notice of appeal's specification as a pro se appellant also

Lastly, Rule 3(c)'s provision that "[a]n appeal must not be dismissed for informality of form or title of the notice,"[153] which the *Torres* Court had rejected as a basis to save Jose Torres's appeal,[154] was amended to add the clause "or for failure to name a party whose intent to appeal is otherwise clear from the notice."[155] Elaborating upon this latter amendment in the accompanying notes, the Advisory Committee explained that "[i]f a court determines it is objectively clear that a party intended to appeal, there are neither administrative concerns nor fairness concerns that should prevent the appeal from going forward."[156]

Significantly, the preceding amendments to Rule 3(c), which constitute the entirety of the Advisory Committee's response to *Torres*, did not in any manner question or challenge the *Torres* Court's conception of Rule 3(c) as a jurisdictional prerequisite.[157] A review of the text of the amendments, along with the committee's accompanying notes, makes plain that the committee's exclusive objective was to facilitate compliance with Rule 3(c)'s party-specification requirement.[158] Considering that the *Torres* Court's jurisdictional understanding of Rule 3(c) was informed in part by its view that the Advisory Committee itself had a jurisdictional understanding of Rule 3(c),[159] the committee's tacit acceptance of that understanding strongly suggests that it approved of the *Torres* Court's approach.

D. The Affirmation of Foman *Too?*

The *Torres* Court's jurisdictional understanding of Rule 3(c)'s requirements would appear to be firmly established, given its explicit affirmation in both *Smith* and *Becker*, and its implicit affirmation by the silence of the Advisory Committee. On two occasions since *Torres*, however, the Court has cited

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encompassed her daughter).

153. FED. R. APP. P. 3(c)(4).

154. *See supra* notes 86-87 and accompanying text.

155. FED. R. APP. P. 3(c)(4).

156. *Id.* 3(c) advisory committee's note (1993 Amendments).

157. *See* 20 MOORE ET AL., *supra* note 2, § 303.21[3][a][ii] (noting that "the 1993 amendment does not alter that part of the *Torres* decision that held that the specification requirements of Appellate Rule 3 are jurisdictional; it simply made the requirements easier to meet"); Servay, *supra* note 77, at 594 ("Importantly, while the amendments to Rule 3(c) make adjustments in what constitutes compliance with this requirement, nothing in [the] amendments or in the advisory committee notes suggest [sic] that the new rule is any less jurisdictional. Thus, the most important part of the *Torres* ruling — that appeals *must* be dismissed *for lack of jurisdiction* where a party fails to comply with the requirements of the rule — has not been overruled.").

158. *See* Servay, *supra* note 77, at 594 (observing that the 1993 amendments "dealt only with one of the three requirements of Rule 3(c) — that the notice of appeal name the party or parties appealing").

159. *See supra* notes 82-85 and accompanying text.

Foman in connection with propositions that simply cannot be reconciled with that understanding. These references suggest that the Court is not yet prepared to abandon a more forgiving approach toward noncompliance with the content requirements of a notice of appeal than a jurisdictional conception of Rule 3(c) would permit.

The first such reference to *Foman* occurred in *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*,[160] which the Court decided only three years after *Torres*. *FirsTier* involved insurance policies that FirsTier Mortgage Co. had procured from Investors Mortgage Insurance Co. to protect against the risk of default on a set of eight real-estate loans.[161] FirsTier brought suit against Investors when, after each of the eight borrowers defaulted on the insured loans, Investors refused to pay FirsTier the policy proceeds.[162] At the conclusion of oral argument on Investors' motion for summary judgment, the district court advised the litigants of its intention to grant the motion on the basis that FirsTier's fraud or bad faith in procuring the policies had voided them.[163]

FirsTier filed a notice of appeal from the district court's bench ruling several weeks later.[164] The district court did not enter a judgment encapsulating that ruling, however, until almost one month after FirsTier filed its notice of appeal.[165] The issue then became whether FirsTier's notice remained effective to appeal from the judgment that the district court subsequently entered.[166] The Court of Appeals for the Tenth Circuit concluded that the notice was fatally premature, and dismissed FirsTier's appeal accordingly.[167]

In reversing the Tenth Circuit's conclusion, the Supreme Court focused upon the relation-forward provision of Rule 4(a)(2) of the Federal Rules of Appellate Procedure, which provided that "a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof."[168] According to the Court, "Rule 4(a)(2) permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a district court

160. 498 U.S. 269 (1991).
161. *Id.* at 270.
162. *Id.*
163. *Id.* at 270-71.
164. *Id.* at 272.
165. *Id.*
166. *See id.*
167. *See id.*
168. FED. R. APP. P. 4(a)(2), 28 U.S.C. app. (1988) (amended 1993). The substance of the current version of Rule 4(a)(2) is virtually the same, with only minor stylistic changes. *See* FED. R. APP. P. 4(a)(2) ("A notice of appeal filed after the court announces a decision or order but before the entry of the judgment or order is treated as filed on the date of and after the entry.").

announces a decision that *would be* appealable if immediately followed by the entry of judgment."[169] The Court was confident that, in such instances, "a litigant's confusion is understandable, and permitting the notice of appeal to become effective when judgment is entered does not catch the appellee by surprise."[170] Accordingly, "[l]ittle would be accomplished by prohibiting the court of appeals from reaching the merits of such an appeal."[171]

Regarding the matter before it, the Court was satisfied that FirsTier's notice of appeal from the district court's bench ruling was effective to appeal from its summary judgment in favor of Investors.[172] Assuming arguendo that the bench ruling was not final because the district court could have changed course before entering judgment, the Court noted that the bench ruling "did announce a decision purporting to dispose of all of FirsTier's claims."[173] If the district court had entered judgment immediately following the bench ruling, the Court continued, the bench ruling undoubtedly would have constituted a "final decision" within the meaning of 28 U.S.C. § 1291.[174] Under the circumstances, the Court found that FirsTier's belief in the finality of the bench ruling was reasonable, and thus its premature notice of appeal was effective to appeal from the judgment that the district court ultimately entered.[175]

For reasons that are not entirely clear, the Court felt obliged to reconcile its determination concerning the effectiveness of FirsTier's premature notice of appeal with Rule 3(c)'s judgment-designation requirement.[176] Presumably, the Court was concerned that its ruling would permit FirsTier to appeal from the district court's judgment even though FirsTier mentioned only the bench ruling in its notice of appeal. The Court appealed to *Foman* in this regard, characterizing that case as establishing that "a notice of appeal that designates a postjudgment motion should be treated as noting an appeal from the final judgment when the appellant's intention to appeal the final judgment is sufficiently 'manifest' that the appellee is not misled."[177] Applying this principle to the Rule 4(a)(2) context, the Court stated that a notice of appeal from a decision that would be appealable if immediately followed by the entry of judgment, such as the district court's bench ruling in favor of Investors,

169. *FirsTier*, 498 U.S. at 276.

170. *Id.*

171. *Id.*

172. *Id.* at 277.

173. *Id.*

174. *Id. See generally* 28 U.S.C. § 1291 (2000) (granting the courts of appeals jurisdiction over "appeals from all final decisions of the district courts of the United States").

175. *FirsTier*, 498 U.S. at 277.

176. *Id.* at 276-77. *See generally* FED. R. APP. P. 3(c)(1)(B) (mandating that a notice of appeal "designate the judgment, order, or part thereof being appealed").

177. *FirsTier*, 498 U.S. at 276 n.6 (citing Foman v. Davis, 371 U.S. 178, 181 (1962)).

"sufficiently manifests an intent to appeal from the final judgment for purposes of Rule 3(c)."[178]

Although the *FirsTier* Court offered an acceptable statement of the *Foman* holding, its application of *Foman* to the Rule 4(a)(2) context is utterly inconsistent with the jurisdictional conception of Rule 3(c)'s reach in *Torres* only three years earlier. Indeed, in rejecting the position that the courts of appeals should review violations of Rule 3(c) for harmless error, the *Torres* Court emphasized that "a litigant's failure to clear a jurisdictional hurdle can never be 'harmless' or waived by a court."[179] Under *Torres*, therefore, a court of appeals simply lacks the authority to pardon a notice of appeal's failure to designate a ruling pursuant to Rule 3(c)'s judgment-designation requirement, even if the appellant's intention to appeal from that ruling was sufficiently manifest that the appellee was not misled. Accordingly, the *FirsTier* Court's favorable reference to *Foman*, not to mention its application of *Foman* to the Rule 4(a)(2) context, suggests that Rule 3(c)'s judgment-designation requirement is not entirely jurisdictional in nature after all.

The second instance in which the Court cited *Foman* in a manner that contravened the *Torres* Court's jurisdictional understanding of Rule 3(c)'s requirements was, oddly enough, in *Becker*. As discussed earlier, *Becker* explicitly recognized a conception of Rule 3(c) as a jurisdictional prerequisite in distinguishing Rule 11(a)'s signature requirement from the content and timing requirements of Rules 3(c) and 4, respectively.[180] Toward the close of its opinion, however, the Court gratuitously observed that, unlike in *Torres*, the matter before it did not involve a notice of appeal that failed to satisfy Rule 3(c)'s party-specification requirement.[181] The Court then stated, even more gratuitously, that "[o]ther opinions of this Court are in full harmony with the view that imperfections in noticing an appeal should not be fatal when no genuine doubt exists about who is appealing, from what judgment, to which appellate court," and cited both *Smith* and *Foman* in support of the statement.[182]

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178. *Id.* at 277 n.6.

179. Torres v. Oakland Scavenger Co., 487 U.S. 312, 317 n.3 (1988).

180. *See supra* notes 138-39 and accompanying text.

181. Becker v. Montgomery, 532 U.S. 757, 767 (2001).

182. *Id.* (citing Smith v. Barry, 502 U.S. 244, 245 (1992); *Foman*, 371 U.S. at 181). The Court recently reiterated this exact quotation, complete with the references to *Smith* and *Foman*, in *Scarborough v. Principi*:

> Permitting a late signature to perfect an appeal, we explained, was hardly pathbreaking, for "[o]ther opinions of this Court are in full harmony with the view that imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court."

541 U.S. 401, 416 (2004) (alteration in original) (quoting *Becker*, 532 U.S. at 767-768 (citing

In so doing, the Court parenthetically described *Foman* as holding that "an appeal was improperly dismissed when the record as a whole — including a timely but incomplete notice of appeal and a premature but complete notice — revealed the orders [Foman] sought to appeal."[183]

Although the statement that "imperfections in noticing an appeal should not be fatal when no genuine doubt exists about who is appealing, from what judgment, to which appellate court"[184] is relatively innocuous when reviewed in isolation,[185] it becomes quite troubling when considered in combination with its reference to *Foman*. Notably, the statement failed to make clear that the notice of appeal *itself* must convey "who is appealing, from what judgment, to which appellate court,"[186] as Rule 3(c) would demand.[187] The statement's failure in this respect created an ambiguity regarding whether a submission other than a notice of appeal may properly convey that information. But the Court then effectively resolved that ambiguity with its citation of *Foman* and corresponding description of *Foman* as holding that "an appeal was improperly dismissed when

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Smith, 502 U.S. at 245, 248-49; *Foman*, 371 U.S. at 181)). At issue in *Scarborough* was whether a litigant may amend a timely application for an award of fees under the Equal Justice Act, 28 U.S.C. § 2412(d)(1)(A) (2000) (authorizing an award of fees to a prevailing party in an action against the United States), after expiration of the thirty-day filing period, in order to cure an initial failure to allege that the government's position in the underlying litigation was not "substantially justified" within the meaning of § 2412(d)(1)(A). *Scarborough*, 541 U.S. at 418-19. The Court's conclusion that such an amendment was permissible was informed in part by its determination in *Becker* that Rule 11(a)'s signature requirement is not jurisdictional in nature. *Id.* at 419 ("Just as failure initially to verify a charge or sign a 'pleading, written motion, [or] other paper,' Fed. Rule Civ. Proc. 11(a), was not fatal to the petitioners' cases in *Edelman* and *Becker*, so here, counsel's initial omission of the assertion that the Government's position lacked substantial justification is not beyond repair." (alteration in original)).

183. *Becker*, 532 U.S. at 768.

184. *Id.* at 767.

185. Indeed, the Court has never insisted upon "perfect" compliance with Rule 3(c)'s requirements. Even *Torres* and *Smith*, both of which emphasized that those requirements are jurisdictional in nature, made clear that the courts of appeals are to construe them "liberally." *Smith*, 502 U.S. at 248 (instructing that "courts should construe Rule 3 liberally when determining whether it has been complied with"); Torres v. Oakland Scavenger Co., 487 U.S. 312, 316 (1988) (instructing that "the requirements of the rules of procedure should be liberally construed"). Moreover, *Smith* arguably tolerates "imperfections in noticing an appeal" to the extent that it allows virtually any document that satisfies the applicable timing and content requirements to serve as the "functional equivalent" of a notice of appeal. *Smith*, 502 U.S. at 248-49 ("If a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal.").

186. *Becker*, 532 U.S. at 767.

187. *See* FED. R. APP. P. 3(c)(1) ("*The notice of appeal* must: (A) specify the party or parties taking the appeal . . . ; (B) designate the judgment, order, or part thereof being appealed; and (C) name the court to which the appeal is taken." (emphasis added)).

the record as a whole — including a timely but incomplete notice of appeal and a premature but complete notice — revealed the orders petitioner sought to appeal."[188] In effect, the Court's point was that the process of determining whether "no genuine doubt exists as to who is appealing, from what judgment, to which appellate court" requires consideration not just of the four corners of a notice of appeal, but of the entire record in the case.[189]

Understood in this light, the statement of the *Becker* Court at issue cannot be reconciled with the jurisdictional conception of Rule 3(c) that the *Becker* Court elsewhere embraces in the same opinion.[190] As noted previously, in rejecting the position that the courts of appeals should review violations of Rule 3(c) for harmless error, the *Torres* Court emphasized that "a litigant's failure to clear a jurisdictional hurdle can never be 'harmless' or waived by a court."[191] Under *Torres*, therefore, a court of appeals would simply lack the authority to excuse a notice of appeal's failure to comply with any of the dictates of Rule 3(c), even if, after a review of the record as a whole, "no genuine doubt exist[ed] about who is appealing, from what judgment, to which appellate court."[192] Accordingly, the *Becker* Court's contrary insinuation further suggests that Rule 3(c)'s requirements are not entirely jurisdictional in nature after all.

III. The Disordered Enforcement of Rule 3(c) in the Courts of Appeals

As the preceding section demonstrates, the Supreme Court's direction concerning the content requirements of a notice of appeal has been anything but methodical. In *Foman*, the Court regarded an act of noncompliance with those requirements as a "mere technicality" that could be easily pardoned when the appellee was neither prejudiced nor misled by the violation.[193] In the subsequent case of *Torres*, the Court arrived at a jurisdictional understanding of those same requirements, and thus noncompliance would dictate dismissal of the appeal regardless of whether the violation was prejudicial or misleading to the appellee.[194] Rather than overrule *Foman* as irreconcilable with this jurisdictional understanding of Rule 3(c), however, the Court distinguished *Foman* on an unconvincing basis. Even more troubling, the Court's affirmation of the *Torres* Court's jurisdictional understanding of Rule 3(c) in *Smith* and *Becker*, not to mention the implicit acceptance of that understanding by the Advisory

188. *Becker*, 532 U.S. at 768.

189. *See id.* at 767-68.

190. *See id.* at 765 (stating that "Appellate Rules 3 and 4 are indeed linked *jurisdictional* provisions" (emphasis added)).

191. Torres v. Oakland Scavenger Co., 487 U.S. 312, 317 n.3 (1988).

192. *Becker*, 532 U.S. at 767.

193. Foman v. Davis, 371 U.S. 178, 181 (1962).

194. *See Torres*, 487 U.S. at 315-17.

Committee on the Federal Rules of Appellate Procedure, has been countered by the Court's affirmation of the approach in *Foman* in both *FirsTier* and *Becker*.

Not surprisingly, the enforcement of Rule 3(c)'s requirements among the courts of appeals has become a rather disordered affair. When confronted with a notice of appeal that contravenes a requirement of Rule 3(c), a court of appeals may take the hard line and dismiss the appeal for want of jurisdiction, and rely upon *Torres* for support. If in a more magnanimous frame of mind, the court can rely upon *Foman* to excuse the violation on the basis that the defect did not prejudice or mislead the appellee. Or, if it wishes to act in the forgiving tradition of *Foman* while respecting the jurisdictional conception of Rule 3(c) adopted in *Torres*, the court might sustain an appeal initiated by a defective notice of appeal simply by determining, through a distorted construction of the pertinent requirement of Rule 3(c), that the requirement had not been violated at all.

The following discussion, which involves an assessment of decisions rendered since *Torres*, reveals the extent to which the courts of appeals — and sometimes the same court of appeals — have taken all of the above approaches with regard to each of Rule 3(c)'s requirements.

A. The Party-Specification Requirement

As observed earlier, the exacting compliance that the courts of appeals had demanded in the wake of *Torres* regarding Rule 3(c)'s party-specification requirement led to a series of amendments designed to facilitate compliance with that requirement.[195] By no means, however, did those amendments eliminate the general requirement that a notice of appeal "specify the party or parties taking the appeal."[196] Moreover, those amendments in no way undermined the *Torres* Court's jurisdictional conception of Rule 3(c)'s requirements.[197] Accordingly, despite the liberalizing effect of the amendments, litigants have frequently lost the opportunity to appeal solely because they contravened the party-specification requirement.[198]

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195. *See supra* notes 147-56 and accompanying text.

196. *See* FED. R. APP. P. 3(c)(1)(A).

197. *See supra* note 157 and accompanying text.

198. *See, e.g.*, United States v. Alisal Water Corp., 427 F.3d 597 (9th Cir. 2005); Reed v. Great Lakes Cos., 330 F.3d 931, 933 (7th Cir. 2003); Meehan v. United Consumers Club Franchising Corp., 312 F.3d 909, 911 (8th Cir. 2002); Corroon v. Reeve, 258 F.3d 86, 91-92 (2d Cir. 2001); Moore v. Robertson Fire Prot. Dist., 249 F.3d 786, 788 (8th Cir. 2001); Twenty Mile Joint Venture, PND, Ltd. v. Comm'r, 200 F.3d 1268, 1273-74 (10th Cir. 1999); Bogle v. Orange County Bd. of County Comm'rs, 162 F.3d 653, 660-61 (11th Cir. 1998); Maerki v. Wilson, 128 F.3d 1005, 1007-08 (6th Cir. 1997); Billino v. Citibank, N.A., 123 F.3d 723, 725-26 (2d Cir. 1997); Agee v. Paramount Commc'ns Inc., 114 F.3d 395, 399-400 (2d Cir. 1997); Bailey v. U.S. Dep't of Army Corps of Eng'rs, 35 F.3d 1118, 1119 n.3 (7th Cir. 1994);

Such a lost opportunity occurred in the Tenth Circuit in *Twenty Mile Joint Venture, PND, Ltd. v. Commissioner*.[199] *Twenty Mile* involved an effort by Twenty Mile Joint Venture (Twenty Mile) and Parker Properties Joint Venture (Parker Properties) to challenge a ruling of the United States Tax Court in favor of the Commissioner of Internal Revenue (the Commissioner).[200] The operative notice of appeal to the Court of Appeals for the Tenth Circuit, however, specified no party other than Twenty Mile.[201] Finding "no mention of Parker Properties whatsoever" in the notice, the Tenth Circuit dismissed the appeal of Parker Properties for lack of jurisdiction.[202]

In so ruling, the Tenth Circuit demonstrated a splendid understanding of both the rationale of *Torres* and the impact of the 1993 amendments to Rule 3(c). First, the court appropriately discounted the significance of any prejudice that the Commissioner may have suffered as a result of Parker Properties' failure to comply with Rule 3(c)'s party-specification requirement.[203] The court supported its view by reference to a prior decision acknowledging the *Torres* Court's determination that, in light of Rule 3(c)'s jurisdictional nature, a violation of one of its requirements is not subject to review for harmless error.[204] Second, the Tenth Circuit properly rejected Parker Properties' contention that the 1993 amendments to Rule 3(c) had the effect of overruling *Torres*.[205] While recognizing that "the amended rule provides somewhat more flexibility than the language in effect when *Torres* was decided," the court emphasized that the rule "still requires that the notice of appeal make clear *in some fashion* the identity of each party desiring to join the appeal."[206]

Notwithstanding its faithful application of *Torres* in *Twenty Mile*, the Tenth Circuit had employed a rather different approach when confronted with a

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Argabright v. United States, 35 F.3d 472, 474 (9th Cir. 1994), *superseded by statute on other grounds*, Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452 (1996), *as recognized in* Miller v. Comm'r, 310 F.3d 640, 642-43 (9th Cir. 2002).

199. 200 F.3d 1268.

200. Under Rule 13(c) of the Federal Rules of Appellate Procedure, Rule 3(c) governs the content of a notice of appeal filed with the Tax Court. *See* FED. R. APP. P. 13(c) ("Rule 3 prescribes the contents of a notice of appeal, the manner of service, and the effect of its filing and service."); *see also id.* ("Form 2 in the Appendix of Forms is a suggested form of a notice of appeal."); *id.* app., form 2 (Notice of Appeal to a Court of Appeals from a Decision of the United States Tax Court).

201. *Twenty Mile*, 200 F.3d at 1273-74.

202. *Id.* at 1274.

203. *Id.* ("The fact that the Commissioner may have suffered no prejudice is not dispositive here.").

204. *Id.* (citing *In re* Woosley, 855 F.2d 687, 688 (10th Cir. 1988)); *see also supra* note 88 and accompanying text.

205. *Twenty Mile*, 200 F.3d at 1274.

206. *Id.*

violation of Rule 3(c)'s party-specification requirement just three years earlier. In *Grimsley v. MacKay*,[207] the court sustained the appeals of several parties who, by the court's own admission, had not been specified in the operative notice of appeal.[208] In refusing to dismiss those appeals, the court referred to a docketing statement that the parties had submitted several weeks after the filing of the notice.[209] The court observed that the docketing statement contained the names of the parties in question, "leaving no doubt as to which parties intended to appeal and curing the defect in the notice of appeal."[210] Accordingly, the court was satisfied with its jurisdiction over the appeals of those parties.[211]

The response of the Tenth Circuit in *Grimsley* to an obvious violation of Rule 3(c)'s party-specification requirement demonstrates that the court was operating outside of the *Torres* framework. Had *Torres* governed, the court's recognition that the parties in question had not been specified in the notice of appeal, in and of itself, would have compelled a dismissal of those appeals for want of jurisdiction. The Tenth Circuit, however, perceived the defect in the notice at issue not as a jurisdictional barrier, but as a defect subject to cure depending upon the content of other submissions in the record.

Such an approach, while contrary to *Torres*, falls squarely within the forgiving tradition established in *Foman*. In the same manner that the *Foman* Court excused an obvious violation of the judgment-designation requirement upon determining that the appellant had conveyed an intent to appeal from the decision in question through other submissions in the record,[212] the Tenth Circuit in *Grimsley* excused an obvious violation of the party-specification requirement upon determining that the parties in question had conveyed an intent to appeal through the docketing statement. In light of that intent, the Tenth Circuit's implicit conclusion was that the defect in the notice did not mislead or prejudice the appellee,[213] which warranted the exercise of jurisdiction over appeals that would have been readily dismissed under *Torres*.[214]

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207. 93 F.3d 676 (10th Cir. 1996).

208. *Id.* at 678.

209. *Id.*

210. *Id.*

211. *Id.*

212. *See supra* text accompanying note 52.

213. *See supra* text accompanying note 51.

214. This is not to say that the Tenth Circuit was wrong to consider the docketing statement in deciding whether to exercise jurisdiction over those parties who had not been specified in the initial notice of appeal. As previously noted, the Supreme Court established in *Smith* that virtually any document can qualify as the functional equivalent of a notice of appeal. *See supra* notes 116-19 and accompanying text. The docketing statement in *Grimsley*, therefore, might have stood on its own as notice of appeal, but only if it satisfied all of the requirements of Rule 3(c), not to mention the timing requirements of Rule 4. *See supra* note 119 and

In addition to considering defects in a notice of appeal as subject to cure by other submissions in the record, the Tenth Circuit has sustained appeals involving clear violations of Rule 3(c)'s party-specification requirement by distorting the meaning of that requirement in order to determine that there was no violation all along. In *Laurino v. Tate*,[215] decided just one year after *Twenty Mile*, the court was presented with a notice of appeal that designated an order imposing Rule 11 sanctions against Thomas McDowell, an attorney who represented plaintiff Frederick Laurino.[216] The appellees moved to dismiss the appeal from that decision on the basis that the notice did not specify McDowell as an appellant, even though he was the sole individual against whom the sanctions had been imposed.[217]

The Tenth Circuit ultimately reached the merits of McDowell's appeal, notwithstanding its observation that the notice "nowhere mentions Mr. McDowell, except for being signed by him as attorney for [Laurino]."[218] Relying upon the 1993 amendment to Rule 3(c)(4), which bars the dismissal of an appeal "for failure to name a party whose intent to appeal is otherwise clear from the notice,"[219] the court stressed that the sanctions order designated in the notice "*only* concerns the sanctions entered against Mr. McDowell."[220] The court thus concluded that the notice's designation of the sanctions order "provides sufficient evidence, by implication, of Mr. McDowell's intention to take an appeal from [that] order."[221]

The fundamental flaw in the *Laurino* court's approach is that it construes Rule 3(c)'s party-specification requirement out of existence in a significant number of cases.[222] As observed above, Rule 3(c) unambiguously prescribes

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accompanying text. In *Grimsley*, however, the court provided no indication that, in addition to specifying the parties who were taking the appeal, the docketing statement also designated the judgment being appealed or named the court to which the appeal was taken.

215. 220 F.3d 1213 (10th Cir. 2000).

216. *Id.* at 1218.

217. *Id.*

218. *Id.*

219. *See* FED. R. APP. P. 3(c)(4); *see also supra* text accompanying notes 153-56.

220. *Laurino*, 220 F.3d at 1218.

221. *Id.*

222. In fairness to the Tenth Circuit, the Ninth Circuit has since adopted the approach employed in *Laurino*. *See* Retail Flooring Dealers of Am., Inc. v. Beaulieu of Am., LLC, 339 F.3d 1146, 1149 (9th Cir. 2003). Specifically, the Ninth Circuit, relying upon amended Rule 3(c)(4), concluded that an attorney who was not listed as an appellant in a notice of appeal nonetheless satisfied Rule 3(c)'s party-specification requirement through the designation of the order being appealed, considering that the order concerned only that attorney. *Id.* Moreover, the Fourth Circuit had employed the same approach even before the operative amendment to Rule 3(c)(4) took effect. *See* Miltier v. Downes, 935 F.2d 660, 663 n.1 (4th Cir. 1991).

The Seventh Circuit, on the other hand, has summarily rejected the notion that amended

that a notice of appeal convey three discrete items of information: (1) the party or parties who are appealing, (2) the judgment or order (or part thereof) being appealed, and (3) the court to which the appeal is taken.[223] Under the Tenth Circuit's notion that an *implicit* party specification can result from an *explicit* order designation, however, the court would be constrained to regard a notice of appeal containing the name of no party whatsoever as having specified a litigant simply because that litigant was the only one with standing to appeal the order designated in the notice. As a result, the determination of whether a notice of appeal fulfills or flouts the party-specification requirement rests not on an objective assessment of the notice's content, but on the number of litigants against whom the district court entered the decision being appealed. Regrettably, the effect of the Tenth Circuit's ruling would have been exactly the same had it announced that, despite the jurisdictional nature of the party-specification requirement, it would no longer enforce that requirement unless at least two parties had standing to appeal from the decision designated in the notice.

Regarding the Tenth Circuit's reliance upon amended Rule 3(c)(4), it must be observed that nothing in that provision would permit a court of appeals to view a notice of appeal containing the name of no party as having satisfied the party-specification requirement. Notably, the provision's prohibition against the dismissal of an appeal applies solely to a notice of appeal's "failure to [specify] a party whose intent to appeal is otherwise clear *from the notice*."[224] When a notice of appeal omits any reference to a litigant as one who is seeking to appeal, it is simply not clear *from the notice* that the litigant intends to appeal,[225] regardless of whether the notice designates an order that concerns no other litigant. Accordingly, the Tenth Circuit's reliance upon amended Rule 3(c)(4) was misplaced.

B. The Judgment-Designation Requirement

The Tenth Circuit is not the only court of appeals that has experienced difficulty in enforcing one of Rule 3(c)'s content requirements with consistency.

Rule 3(c)(4) saves an attorney's appeal from a sanctions order (even one that concerns only that attorney) when the notice of appeal fails to list that attorney as an appellant. *See* Reed v. Great Lakes Cos., 330 F.3d 931, 933 (7th Cir. 2003) ("Although Fed. R.App. P. 3(c)(4) provides that an appeal should not be dismissed 'for failure to name a party whose intent to appeal is otherwise clear from the notice [of appeal],' the lawyer's intent to appeal is not clear from the notice of appeal — indeed is not so much as hinted at in it — and as a result we lack jurisdiction over her challenge to the sanction that was imposed on her." (alteration in original) (quoting Bogle v. Orange County Bd. of County Comm'rs, 162 F.3d 653, 660 (11th Cir. 1998)).

223. FED. R. APP. P. 3(c)(1).

224. *Id.* 3(c)(4) (emphasis added).

225. *See Reed*, 330 F.3d at 933.

Indeed, the Seventh Circuit has had similar trouble regarding Rule 3(c)'s requirement that a notice of appeal "designate the judgment, order, or part thereof being appealed."[226]

One manner in which the Seventh Circuit has responded to violations of the judgment-designation requirement is to refuse to exercise jurisdiction over the nondesignated decision, relying upon the *Torres* Court's jurisdictional understanding of Rule 3(c)'s requirements. The court took this approach in *Garcia v. City of Chicago*,[227] in which plaintiff Rafael Garcia brought claims against the City of Chicago, among other defendants, arising from an alleged beating that he suffered at the hands of a Chicago police officer during an arrest.[228] One such claim was that Garcia's rights under the Fourth Amendment were violated because he was unable to attend the probable-cause hearing conducted the day after his arrest.[229] After the district court dismissed that claim, Garcia appealed to the Seventh Circuit. His notice of appeal, however, did not designate that dismissal as it related to the appellee City of Chicago.[230] Citing *Torres*, the court characterized Garcia's failure as "jurisdictional," and thus determined that it could not consider that component of Garcia's appeal.[231]

Despite its reliance upon *Torres* in *Garcia*, the Seventh Circuit had expressly repudiated *Torres* in favor of *Foman* when confronted with a violation of the judgment-designation requirement just three years earlier, in *Cook v. Navistar International Transportation Corp.*.[232] In *Cook*, plaintiff Osie Cook sustained injuries while checking the electrical connections of a truck that was designed and built by defendant Navistar.[233] In addition to Navistar, Cook sued Mid-Century Insurance Co., an insurer that had issued a worker's-compensation policy to Cook's employer.[234]

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226. *See* FED. R. APP. P. 3(c)(1)(B).

227. 24 F.3d 966 (7th Cir. 1994).

228. *Id.* at 968.

229. *Id.* at 969.

230. *Id.* at 970 n.4.

231. *Id.* The Seventh Circuit is not alone in this respect. Other courts of appeals have expressly cited *Torres* in responding to a violation of the judgment-designation requirement by dismissing an appeal from a particular decision for lack of jurisdiction. *See, e.g., In re* Spookyworld, Inc., 346 F.3d 1, 6 (1st Cir. 2003); Life Plus Int'l v. Brown, 317 F.3d 799, 804-05 (8th Cir. 2003); United States v. Glover, 242 F.3d 333, 335-37 (6th Cir. 2001); United States v. Universal Mgmt. Servs., Inc., 191 F.3d 750, 756-57 (6th Cir. 1999); Klaudt v. U.S. Dep't of Interior, 990 F.2d 409, 411 (8th Cir. 1993); Nolan v. U.S. Dep't of Justice, 973 F.2d 843, 846-47 (10th Cir. 1992); Faysound Ltd. v. Falcon Jet Corp., 940 F.2d 339, 342-43 (8th Cir. 1991) (per curiam).

232. 940 F.2d 207, 211 (7th Cir. 1991).

233. *Id.* at 208.

234. *Id.* at 210.

Cook eventually prevailed at trial, and the district court entered judgment against Navistar on October 4, 1989.[235] The district court did not, however, adjudicate Cook's claim against Mid-Century.[236] The Seventh Circuit thus dismissed Cook's appeal from the October 4 judgment.[237] On remand, the district court entered a final judgment against Navistar under Rule 54(b) of the Federal Rules of Civil Procedure on August 29, 1990.[238] As for Mid-Century, the district court entered a final judgment on September 5, 1990, and then entered a modified final judgment on October 12, 1990.[239]

Cook subsequently sought to appeal to the Seventh Circuit from the August 29 judgment entered under Rule 54(b).[240] Rather than making any reference to that judgment, however, Cook's notice of appeal designated only the judgments entered on October 4, 1989; September 5, 1990; and October 12, 1990, respectively.[241] This posed a problem for Cook because, as the Seventh Circuit noted, "[t]he October 4, 1989 'judgment' was invalid, and the other two identified judgments dealt solely with Mid-Century."[242] Navistar soon seized upon the defect in Cook's notice and argued that, under *Torres*, the court had no jurisdiction to review the August 29 judgment in light of Cook's failure to comply with Rule 3(c)'s judgment-designation requirement.[243]

The Seventh Circuit ultimately rejected Navistar's jurisdictional contention and reached the merits of Cook's appeal from that judgment.[244] Although acknowledging that *Torres* was "somewhat analogous to the facts in this case," the court found *Foman* to be "more precisely on point."[245] The court then observed that, having "briefed and argued the merits of the underlying judgment in this case knowing full well that Cook intended to appeal the adverse jury verdict," Navistar could not argue at that late point that "it has been prejudiced by the defect in Cook's notice of appeal."[246] In the end, by opting to abide by

235. *Id.*

236. *Id.*

237. *Id.* Presumably, the basis of the court's dismissal was that the district court's October 4 judgment was not a "final decision" within the meaning of 28 U.S.C. § 1291 in light of the unresolved claims involving Mid-Century.

238. *Cook*, 940 F.2d at 210. Rule 54(b) authorizes a district court to enter final judgment on fewer than all claims or parties in an action "upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." FED. R. CIV. P. 54(b).

239. *Cook*, 940 F.2d at 210.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 211.

244. *Id.*

245. *Id.*

246. *Id.* (citation omitted).

Foman rather than *Torres*, the court was able to reach the merits of Cook's appeal from a judgment that appeared nowhere in his notice of appeal.

In addition to following the forgiving approach of *Foman*, the Seventh Circuit has sustained an appeal involving flagrant violations of Rule 3(c)'s judgment-designation requirement by distorting the meaning of that requirement in order to conclude that there was no violation all along. In *Librizzi v. Children's Memorial Medical Center*,[247] Gilbert Librizzi brought suit against the Children's Memorial Medical Center, his former employer, to recover benefits to which he was allegedly entitled under a pension plan.[248] The district court dismissed the suit as untimely and entered judgment in January 1997.[249] Librizzi later brought a motion for reconsideration, which the district court denied in March 1997.[250] Librizzi subsequently sought to appeal from both the judgment and the denial of his motion for reconsideration.[251] In his notice of appeal to the Seventh Circuit, however, Librizzi failed to designate the denial of the motion along with the judgment.[252]

In rejecting the Medical Center's assertion that this obvious defect in Librizzi's notice carried jurisdictional repercussions, the Seventh Circuit was satisfied that the notice contained no defect at all.[253] The court reasoned that a notice of appeal's designation of an underlying judgment "brings up all of the issues in the case" for purposes of Rule 3(c)'s judgment-designation requirement.[254] "Pointing to either an interlocutory order or a post-judgment decision such as an order denying a motion to alter or amend the judgment is never necessary," the court explained, "unless the appellant wants to confine the appellate issues to those covered in the specific order."[255] Accordingly, the court reviewed the district court's denial of Librizzi's motion for reconsideration even though the notice made no mention of that decision.

In fairness to the Seventh Circuit, the judgment-designation requirement has never been understood as demanding that a notice of appeal make explicit reference to each decision that an appellant wishes to challenge on appeal. The courts of appeals have universally recognized that, when a notice of appeal designates a final judgment in an action, the notice effectively designates all

247. 134 F.3d 1302 (7th Cir. 1998).

248. *Id.* at 1304.

249. *Id.* at 1305-06.

250. *Id.* at 1306.

251. *Id.* at 1305-06.

252. *Id.* (observing that "Librizzi's notice of appeal identifies the judgment of January 1997, rather than the order of March 1997 denying reconsideration, as the order under review").

253. *Id.*

254. *Id.* at 1306.

255. *Id.*

interlocutory decisions encompassed by or merging into that judgment.[256] In *Librizzi*, however, the decision that the notice of appeal failed to designate was neither one that was encompassed by the underlying judgment nor one that merged into the underlying judgment, considering that the district court's denial of Librizzi's motion for reconsideration did not occur until *after* the underlying judgment had already been entered. The Seventh Circuit was thus incorrect in asserting that a party "brings up all of the issues in the case"[257] by designating nothing more than the underlying judgment in a notice of appeal.

In addition, the explicit language of Rule 4 of the Federal Rules of Appellate Procedure establishes that a notice of appeal must designate a disposition of the type of motion at issue in *Librizzi* in order to satisfy the judgment-designation requirement. Under Rule 4(a)(4)(A), when a litigant timely files one of several enumerated post-judgment motions — including a motion to alter or amend the judgment under Rule 59 of the Federal Rules of Civil Procedure[258] — the time to appeal from the underlying judgment runs "for all parties from the entry . . .

256. *See, e.g.*, McBride v. CITGO Petroleum Corp., 281 F.3d 1099, 1104 (10th Cir. 2002) ("[A] notice of appeal which names the final judgment is sufficient to support review of all earlier orders that merge into the judgment."); Greer v. St. Louis Reg'l Med. Ctr., 258 F.3d 843, 846 (8th Cir. 2001) ("Ordinarily, a notice of appeal that specifies the final judgment in a case should be understood to bring up for review all of the previous rulings and orders that led up to and served as a predicate for that final judgment."); Weiss v. Cooley, 230 F.3d 1027, 1031 (7th Cir. 2000) ("In general, a notice of appeal from a final judgment . . . is adequate to bring up everything that preceded it."); Harvey v. Waldron, 210 F.3d 1008, 1012 (9th Cir. 2000) ("An appeal from a final judgment draws into question all earlier, non-final orders and rulings which produced the judgment." (internal quotation marks omitted) (quoting United Ass'n of Journeymen & Apprentices v. Bechtel Constr. Co., 128 F.3d 1318, 1322 (9th Cir. 1997)); John's Insulation, Inc. v. L. Addison & Assocs., 156 F.3d 101, 105 (1st Cir. 1998) ("[I]t has been uniformly held that a notice of appeal that designates the final judgment encompasses not only that judgment, but also all earlier interlocutory orders that merge in the judgment."); Trust Co. of La. v. N.N.P. Inc., 104 F.3d 1478, 1485 (5th Cir. 1997) ("[A]n appeal from a final judgment sufficiently preserves all prior orders intertwined with the final judgment."); Cattin v. Gen. Motors Corp., 955 F.2d 416, 428 (6th Cir. 1992) ("[I]t is well settled in this circuit that an appeal from a final judgment draws into question all prior non-final rulings and orders."); Barfield v. Brierton, 883 F.2d 923, 930 (11th Cir. 1989) ("[T]he appeal from a final judgment draws into question all prior non-final orders and rulings which produced the judgment."); *see also* 20 MOORE ET AL., *supra* note 2, § 303.21[3][c][iii] ("An appeal from the final judgment usually draws into question all prior nonfinal orders and all rulings which produced the judgment."); 16A WRIGHT, MILLER & COOPER, *supra* note 2, § 3949.4 ("[A] notice of appeal that names the final judgment is sufficient to support review of all earlier orders that merge in the final judgment under the general rule that appeal from a final judgment supports review of all earlier interlocutory orders.").

257. *See Librizzi*, 134 F.3d at 1306.

258. FED. R. APP. P. 4(a)(4)(A)(iv).

of the last such remaining motion."[259] The Rule further provides that a litigant who seeks to challenge the disposition of a Rule 4(a)(4)(A) motion "must file a notice of appeal, or an amended notice of appeal — *in compliance with Rule 3(c)* — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion."[260] By expressly linking compliance with Rule 3(c) with the filing of a notice of appeal, or the amending of a previously filed notice of appeal, after the disposition of a Rule 4(a)(4)(A) motion, the Rules make abundantly clear that the judgment-designation requirement will not be satisfied as to an appeal from that disposition if the notice designates nothing more than the underlying judgment.

Notwithstanding these clear dictates, the Seventh Circuit in *Librizzi* asserted that a notice of appeal need not ordinarily designate "a post-judgment decision such as an order denying a motion to alter or amend the judgment."[261] The court thus felt free to review the disposition of such a motion even though the only decision designated in Librizzi's notice of appeal was the underlying judgment. In so doing, the court distorted the judgment-designation requirement to the point where the relevant provisions of Rule 4 no longer exist.

C. The Court-Naming Requirement

As with the party-specification and judgment-designation requirements, the courts of appeals have experienced difficulty in consistently applying Rule 3(c)'s requirement that a notice of appeal "name the court to which the appeal is taken."[262] One approach is to respond to a violation of the court-naming requirement by dismissing the appeal for lack of jurisdiction in accordance with *Torres*. The Court of Appeals for the Sixth Circuit pursued this course in *United States v. Webb*,[263] in which Earl Anthony Webb's effort to appeal from his conviction and sentence was stifled by the failure of his notice of appeal to name a court of appeals.[264] The Sixth Circuit's analysis emphasized the jurisdictional understanding of Rule 3(c) as developed in *Torres* and reiterated in *Smith*, while pointing out that the 1993 amendments did nothing to alter that understanding.[265] The court ultimately concluded that it lacked jurisdiction over Webb's appeal "[i]n light of Rule 3(c)'s clear mandate that a notice of appeal must name the court to which the appeal is taken, coupled with

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259. *Id.* 4(a)(4)(A).

260. *Id.* 4(a)(4)(B)(ii) (emphasis added).

261. *Librizzi*, 134 F.3d at 1306.

262. FED. R. APP. P. 3(c)(1)(C).

263. 157 F.3d 451, 452-53 (6th Cir. 1998) (per curiam), *abrogated by* Dillon v. United States, 184 F.3d 556, 557-58 (6th Cir. 1999) (en banc).

264. *Id.* at 452.

265. *Id.*; *see also supra* note 157 and accompanying text.

the well-established principle that the requirements of Rule 3(c) are jurisdictional in nature."[266]

An entirely different response to a violation of the court-naming requirement, which the Court of Appeals for the D.C. Circuit has employed, is to act in the forgiving tradition of *Foman* and excuse the defect because it neither misleads nor prejudices the appellee.[267] In *Anderson v. District of Columbia*,[268] Grant Anderson brought suit in federal court against the District of Columbia, alleging that several of its police officers had used excessive force in arresting him.[269] The district court subsequently entered summary judgment in favor of the District, and Grant sought to appeal.[270] Although the D.C. Circuit was the only court of appeals with jurisdiction to review the decision in question,[271] Anderson's notice of appeal named the Supreme Court of the United States as the pertinent appellate tribunal.[272]

In holding that Anderson's notice of appeal was not fatally defective, the D.C. Circuit highlighted that it was "the only [court] to which Anderson may

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266. *Webb*, 157 F.3d at 453. The approach in *Webb* has been criticized in one treatise as "unduly harsh, as there is only one court to which the appeal could be taken." MICHAEL E. TIGAR & JANE B. TIGAR, FEDERAL APPEALS: JURISDICTION AND PRACTICE § 6.02 n.18 (3d ed. 1999).

267. At least two other courts of appeals have used this same approach in connection with the court-naming requirement. *See* United States v. Treto-Haro, 287 F.3d 1000, 1002 n.1 (10th Cir. 2002) ("The Government's failure to identify this Court in its notice of appeal, while careless if not inexcusable, did not prejudice or mislead [the appellee]. Accordingly, we conclude the Government's notice of appeal is sufficient to provide us with jurisdiction."); Ortiz v. John O. Butler Co., 94 F.3d 1121, 1125 (7th Cir. 1996) ("Although designation of the court to which the appeal is taken is a mandatory requirement under Rule 3(c), the defect is not fatal where the intention to appeal to a certain court may be inferred from the notice and the defect has not misled the appellee.").

268. 72 F.3d 166 (D.C. Cir. 1995).

269. *Id.* at 167.

270. *Id.*

271. Except for certain types of decisions that the Court of Appeals for the Federal Circuit has exclusive jurisdiction to review, *see generally* 28 U.S.C. §§ 1292(c)-(d), 1295 (2000), the only forum in which an appellant may appeal a district court's decision is the court of appeals for the circuit comprising the pertinent judicial district, *see id.* § 1294(1) (providing that an appeal shall be taken "[f]rom a district court of the United States to the court of appeals for the circuit embracing the district").

Because Anderson filed his action in the U.S. District Court for the District of Columbia, *see Anderson*, 72 F.3d at 167, and the decision is not one that the Federal Circuit had exclusive jurisdiction to review, the D.C. Circuit was the only court in which Anderson could have appealed. *See* 28 U.S.C. § 41 (2000) (stating that the D.C. Circuit encompasses the District of Columbia).

272. *Anderson*, 72 F.3d at 167.

appeal."[273] Notwithstanding that the notice made no mention of the D.C. Circuit, the court found that the document conferred "fair notice" both to Anderson's adversary and to the court, considering that "it was obvious in which court [Anderson's] appeal properly lay."[274] "Because the intention to appeal to this court may be inferred from Anderson's notice, and the defect in the notice has not materially misled the appellee," the court was satisfied with its jurisdiction over the appeal.[275]

A third approach to a violation of Rule 3(c)'s court-naming requirement is to sustain the appeal not by resorting to the forgiving tradition of *Foman*, but instead by distorting that requirement in order to find that there was no violation in the first place. The Sixth Circuit adopted this approach when, one year after its decision in *Webb*, the court conducted an en banc reevaluation of the court-naming requirement in *Dillon v. United States*.[276] In *Dillon*, the notice of appeal submitted by Thomas Dillon, like that in *Webb*, did not contain the name of a court of appeals.[277] Despite its understanding of the jurisdictional nature of the

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273. *Id.* at 168.

274. *Id.*

275. *Id.* at 169. Although the D.C. Circuit's approach is perfectly justifiable under *Foman*, the same result would have obtained even if the court had determined that the question of its jurisdiction over Anderson's appeal was governed by *Torres*. In particular, when a litigant's notice of appeal names a court that lacks jurisdiction over the appeal, that court may transfer the appeal to the court that would have had jurisdiction over the appeal at the time that the notice was filed, and the appeal will proceed in the transferee court as if it had been filed there in the first place. *See* 28 U.S.C. § 1631 (2000) ("Whenever . . . an appeal . . . is noticed for . . . a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such . . . appeal to any other such court in which the . . . appeal could have been brought at the time it was . . . noticed, and the . . . appeal shall proceed as if it had been . . . noticed for the court to which it is transferred on the date upon which it was actually . . . noticed for the court from which it is transferred."); *see also* 20 MOORE ET AL., *supra* note 2, § 303.21[3][d] ("If an appeal is improperly noticed to a court that lacks jurisdiction, that court may nevertheless transfer the appeal to the proper court, as long as the notice would have been timely if filed in the proper court.").

In light of this transfer mechanism, the D.C. Circuit in *Anderson* should have given the Supreme Court, as the only tribunal named in Anderson's notice of appeal, the prerogative of determining the disposition of Anderson's appeal. The Supreme Court, in turn, would almost certainly have responded by returning the appeal via transfer to the D.C. Circuit, where the appeal would have proceeded as if Anderson had filed it there initially. *See* 20 MOORE ET AL., *supra* note 2, § 303.21[3][d]. In the end, the D.C. Circuit would have reached the merits of Anderson's appeal only after having demonstrated due regard for the court-naming requirement, rather than communicating to litigants that a failure to comply with that requirement is readily forgivable.

276. 184 F.3d 556, 557-58 (6th Cir. 1999) (en banc).

277. *Id.* at 557.

court-naming requirement in light of *Torres*,[278] a majority of the en banc court nevertheless concluded that the panel should have exercised jurisdiction over the appeal.[279]

The court reached its conclusion by drawing a distinction between appeals over which only a single court of appeals would have jurisdiction, and appeals over which more than one court of appeals would have jurisdiction.[280] When an appeal falls into the latter category, the court stated, the "failure to designate the court of appeal will result in dismissal of the appeal for lack of jurisdiction."[281] On the other hand, when only a single appellate forum is available, the appellant's act of "filing the notice of appeal with the clerk of the district court from whose judgment the appeal is taken has the *practical* effect of designating the appropriate court of appeals and thereby eliminating any possible confusion with respect to the appellate forum."[282] Upon determining that "the Sixth Circuit represented the only appellate court available to petitioner," the court was satisfied that "the notice of appeal was not defective because petitioner did not have a choice of forum and filed his notice of appeal in the district court that rendered judgment."[283]

The only legal authority offered by the *Dillon* court in support of its approach was an Advisory Committee statement accompanying the 1993 amendments to Rule 3(c).[284] Although acknowledging that those amendments were directed solely at facilitating compliance with Rule 3(c)'s party-specification requirement,[285] the court found that the "underlying rationale" of the amendments applied equally to the court-naming requirement.[286] The court focused specifically upon the Advisory Committee's observation that "if a court determines it is objectively clear that a party intended to appeal, there are neither administrative concerns nor fairness concerns that should prevent the appeal from going forward."[287] Incorporating that language into its new standard for the court-naming requirement, the court reasoned that "[w]hen 'there is only one appellate forum available to a litigant, there are neither administrative concerns nor fairness concerns that should prevent the appeal from going forward' if,

278. *Id.* at 558 ("While *Torres* specifically concerned the proper construction of Rule 3(c)(1)(A), it made clear that the entire rule was jurisdictional in nature.").

279. *Id.*

280. *Id.* at 557-58.

281. *Id.* at 558.

282. *Id.* at 557 (emphasis added).

283. *Id.*

284. *Id.* at 558.

285. *Id.* (noting that "the 1993 amendments were aimed at ameliorating the effect of Rule 3(c)(1)(A)").

286. *Id.*

287. *Id.* (quoting FED. R. APP. P. 3(c) advisory committee's note (1993 Amendments)).

through inadvertence, an appellant has failed to name the court to which the appeal is taken."[288]

Although the *Dillon* court's analysis suffers from several significant shortcomings, perhaps the most egregious is that it entirely purges the court-naming requirement from Rule 3(c).[289] This consequence follows from the court's conclusion that a notice of appeal need not *explicitly* name a court of appeals unless the appellant may take the appeal to more than one appellate forum.[290] In reaching this conclusion, however, the court failed to comprehend that there is never more than one appellate forum available to a litigant whose appeal is governed by Rule 3. Put another way, if a decision may be challenged only through the filing of a notice of appeal that must satisfy the content requirements of Rule 3(c), there is one (and only one) court of appeals that could have jurisdiction to review the decision.[291] Accordingly, although the *Dillon*

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288. *Id.* (quoting FED. R. APP. P. 3(c) advisory committee's note (1993 Amendments)).

289. As one might expect, the majority's approach in *Dillon* produced extensive criticism from the judges in dissent, who persuasively argued that the en banc court offered no viable legal basis for limiting the application of Rule 3(c)'s court-naming requirement in such a manner. *Id.* at 558-66. Judge Ryan derided the court for having produced an "800-pound gorilla rule," construing the court's holding as conveying the message that "even though this court has no authority whatever to excuse compliance with Rule 3(c)(1)(C), it nevertheless has the 'power' to do so because more active judges on this court are willing to excuse noncompliance with the rule than are unwilling to do so." *Id.* at 559 (Ryan, J., dissenting). Similarly, Judge Clay remarked that "there exists no legal authority for this judicial rewriting of the rule by which the majority blithely repudiates the [court-naming requirement] without any discernibly cogent reason, explanation or basis for its decision to do so." *Id.* at 560 (Clay, J., dissenting). Judge Gilman, while expressing sympathy for the majority's approach, could not join it because there was no "justifiable way to ignore the clear requirements of Rule 3(c)(1) of the Federal Rules of Appellate Procedure as interpreted by the United States Supreme Court." *Id.* at 566 (Gilman, J., dissenting).

290. *See supra* text accompanying notes 280-83.

291. The two categories of appeals governed by Rule 3 are appeals as of right from decisions of the federal district courts, *see supra* note 17 and accompanying text, and appeals from decisions of the U.S. Tax Court, *see supra* note 200 and accompanying text. As observed earlier, the only forum in which a litigant may appeal the decision of a district court is the court of appeals for the circuit comprising the pertinent judicial district, unless the Court of Appeals for the Federal Circuit has exclusive jurisdiction to review the decision. *See supra* note 271 and accompanying text. Accordingly, a litigant will have only a single appellate forum available to appeal from any decision of a district court.

With regard to decisions of the Tax Court, 26 U.S.C. § 7482(a) (2000) delineates the appropriate appellate forum. The forum in question will depend primarily upon whether the case falls into one of six enumerated categories. *Id.* § 7482(b)(1)(A)-(F). For example, in the case of a non-corporate petitioner who seeks redetermination of tax liability, the Tax Court's decision may be appealed to the federal court of appeals for the circuit encompassing the petitioner's legal residence. *Id.* § 7482(b)(1)(A). If none of those six categories apply, the D.C. Circuit has jurisdiction over the appeal. *Id.* § 7482(b)(1). Notwithstanding these provisions,

court may have stressed that it had no intention of waiving the court-naming requirement,[292] it did precisely that by holding that a notice of appeal must *explicitly* "name the court to which the appeal is taken" only in a category of cases that simply does not exist.[293] The effect of *Dillon* is thus that every notice of appeal filed with the Sixth Circuit necessarily complies with the court-naming requirement, making it impossible to violate that requirement.

IV. The Case for a No-Nonsense Approach to the Enforcement of Rule 3(c)

As the preceding discussion illustrates, the enforcement of Rule 3(c)'s requirements by the courts of appeals has become mired in confusion and unpredictability. It is difficult to expect any other outcome, however, considering that the Supreme Court held in *Foman* that noncompliance with those requirements was readily pardonable and thus should have no effect on an appeal, then held in *Torres* — while purporting to reconcile *Foman* — that such noncompliance was necessarily fatal to an appeal, and has since reaffirmed both approaches on various occasions. In light of this inconsistency, it is not surprising that several courts of appeals have shifted radically from one approach to another within a span of just a few years. Nor is it surprising that some courts, rather than arbitrarily choosing between *Foman* and *Torres*, have addressed an act of noncompliance with a requirement of Rule 3(c) simply by construing that requirement out of existence. The end result is that litigants to an appeal cannot predict with any degree of confidence how a court of appeals

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a taxpayer and the government may stipulate in writing that the decision in question may be reviewed in a particular court of appeals, *id.* § 7482(b)(2), but "[i]n the case of any decision of the Tax Court in a proceeding under section 7478," the decision may only be reviewed by the D.C. Circuit, *id.* § 7482(b)(3).

The significant feature of the foregoing regime is that only a single appellate forum will be available to a litigant who seeks to appeal from an adverse decision of the Tax Court. Accordingly, the *Dillon* court's reference to an appeal from a Tax Court decision as an example of an appeal in which more than one appellate forum would be available, *see Dillon*, 184 F.3d at 558 & n.1, is simply incorrect.

In addition to appeals from Tax Court decisions, the *Dillon* court cited appeals involving claims for "black lung benefits" and appeals from "NLRB actions" as among those in which more than one appellate forum would be available. *Id.* at 558 n.1. But the relevant decision-making bodies in those cases are federal administrative agencies, not courts. And when a litigant seeks to challenge a decision of a federal administrative agency, the initiating document is not a notice of appeal filed with the district court in accordance with Rule 3 but a petition for review filed with the court of appeals in accordance with Rule 15. *See supra* note 13 and accompanying text. Accordingly, an appeal from a decision of an administrative agency does not implicate Rule 3(c)'s court-naming requirement.

292. *Dillon*, 184 F.3d at 558.

293. *Id.* at 557 (quoting FED. R. APP. P. 3(c)(1)(C)).

will respond to a notice of appeal that violates one or more of Rule 3(c)'s requirements.

The Supreme Court now bears the responsibility of restoring order and predictability to the enforcement of Rule 3(c) by demanding that the courts of appeals apply a no-nonsense approach to defective notices of appeal. Such an approach would involve two components. First and foremost, a court of appeals must treat an outright failure to abide by a requirement of Rule 3(c) as nothing other than a violation of that requirement. This is not to say that the courts of appeals should disregard the Supreme Court's repeated admonition that the requirements of Rule 3(c) be liberally construed.[294] Indeed, it is entirely appropriate for a court to give a litigant the benefit of the doubt when a good-faith effort at compliance is less than exact. It is entirely inappropriate, however, for a court to distort the meaning of a requirement in order to transform an outright violation into an act of compliance, as the Sixth Circuit did in *Dillon* by effectively holding that a notice of appeal containing the name of no court of appeals whatsoever had "name[d] the court to which the appeal is taken" within the meaning of Rule 3(c).[295] The effect of such an exercise is to amend an established procedural rule by judicial fiat, rather than by the administrative mechanism envisioned by Congress.

Second, once satisfied that a requirement of Rule 3(c) has been violated, a court of appeals must dismiss the appeal in accordance with the jurisdictional conception of Rule 3(c) adopted in *Torres*. In this regard, the Supreme Court should take the first possible opportunity to address the continuing viability of *Foman*, and do away with it once and for all. If the Court's aim is truly to remedy the disordered enforcement of Rule 3(c)'s requirements, it can no longer afford to countenance a decision that characterizes a violation of one of those requirements as a "mere technicality" and permits a court of appeals to reach the merits of an appeal so long as the violation did not mislead or prejudice the appellee.[296] Indeed, *Foman* is a prescription not for the enforcement of Rule 3(c)'s requirements, but for the circumvention of those requirements.

An unfortunate consequence of treating Rule 3(c) as a jurisdictional prerequisite is that many litigants will lose the opportunity to prosecute their appeals. It is particularly troubling when a litigant would have successfully obtained relief from the decision below but for a Rule 3(c)-based dismissal of the appeal. One can certainly understand how a court of appeals would be tempted to overlook an act of noncompliance with Rule 3(c) when doing so would allow it to effect justice in that individual case. But as Justice Scalia

294. *See supra* note 185.

295. FED. R. APP. P. 3(c)(1)(C).

296. Foman v. Davis, 371 U.S. 178, 181 (1962).

observed in *Torres*, a sanction for the failure to comply with a procedural rule "always prevents the court from deciding where justice lies in the particular case, on the theory that securing a fair and orderly process enables more justice to be done in the totality of cases."[297] Considering how disorderly and unpredictable the enforcement of Rule 3(c) has become, it is high time that the Supreme Court shift the focus of the courts of appeals to the totality of cases. To the extent that dismissals of appeals become unacceptably high, the mechanism of rule amendment remains available to ease compliance with Rule 3(c)'s requirements, as was done with the party-specification requirement in 1993, or to abolish one or more of them altogether.

Conclusion

The uncomplicated nature of Rule 3(c)'s content requirements has not translated into uncomplicated enforcement of those requirements by the federal courts of appeals. But the difficulty experienced by the courts of appeals in enforcing Rule 3(c)'s requirements is understandable in light of the Supreme Court's inconsistent guidance on the nature of those requirements. The Court established in *Foman* that violations of those requirements can be readily excused, then shifted to a jurisdictional conception of those requirements in *Torres* without making a clean break with *Foman*, and has since reaffirmed both approaches notwithstanding that they simply cannot be reconciled. Consequently, the same court of appeals can address the same violation of a requirement of Rule 3(c) by dismissing the appeal under *Torres* for lack of jurisdiction, or overlook the violation under *Foman* if satisfied that the defect did not prejudice or mislead the appellee. Then again, in an effort to respect both the *Torres* Court's jurisdictional conception of Rule 3(c)'s requirements, while operating in the spirit of forgiveness mandated by *Foman*, the court might distort the meaning of the relevant requirement of Rule 3(c) in an effort to conclude that there was no violation at all.

The solution to this problem of confusion and unpredictability in the enforcement of Rule 3(c) is the adoption of a no-nonsense approach to defective notices of appeal. By treating a litigant's noncompliance with a requirement of Rule 3(c) as such, and responding to that noncompliance by dismissing the appeal pursuant to the jurisdictional conception of Rule 3(c) espoused in *Torres*, the courts of appeals would successfully restore the fair and orderly enforcement of Rule 3(c) that has been so sorely lacking.

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297. Torres v. Oakland Scavenger Co., 487 U.S. 312, 319 (1988) (Scalia, J., concurring in the judgment).